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Attorney General Greek L. Rice—A Memorial

John M. Kuykendall

Contract—Fact or Legal Hypothesis?

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Harold J. Gallagher

May, 1950

VOLUME XXI NUMBER 3

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Mississippi Law Journal

Volume XXI May, 1950 Number 3

ATTORNEY GENERAL GREEK L. RICE

*John M. Kuykendall**

That "Death loves a shining mark, a signal blow," is borne out in the death of Honorable Greek L. Rice, the Attorney General of the State of Mississippi, at Jackson, on February 21, 1950. But another has said:

Life's work is well done,
Life's race well run,
Life's work well done,
Then comes rest.

It is difficult to word an article of this nature, and especially when the subject has been the lifelong friend and close associate of the writer. I knew Greek Rice as a young man. For all these years we have been close, and I know how he is still loved, honored and respected by those he served.

General Rice was born in Tallahatchie County, Mississippi, on the 8th day of May, 1886, a son of Lint I. and Ann Presgrove Rice. After receiving his elementary education in the county schools, he graduated in literary work at Mississippi College and later in law at Cumberland University. He began and continued in the general practice of law at Charleston and Sumner until World War I when he went into the service of his country.

He was a great lawyer, interested in the profession and in the development of the State Bar and its program. As a legislator, he made a splendid record. As a circuit judge—invariably just and upright—his career was outstanding.

In 1931, he was elected Attorney General. Here it was that he made a record unsurpassed by any man who has served our state. As Mississippi's chief counsellor, his wisdom, grasp of fact and of law, and his ability to think the matter through were invaluable. He was a man of integrity, character, sound common sense, courtesy, wisdom and ability. Above all, he knew how to meet and deal with his fellow man.

He was for years a member and officer of the Baptist Church, giving of his means, his time and talent to its service.

In the passing of General Rice, the state, the bar, and the citizenship of the state and the nation have lost a most valuable counsellor and friend.

---

*Circuit Judge, 17th Circuit Court District, Charleston, Mississippi.

CONTRACT—FACT OR LEGAL HYPOTHESIS?

*Orvill C. Snyder**

"The subject of Contracts is a very important branch of the law . . . ."[1] "The law of contracts," moreover, "springs from a coherent philosophy" and, accordingly, "some troublesome problems become simple when due regard is had for elementary ideas."[2] We should, therefore, be able "to state . . . the nature of . . . contract . . . the relation of the idea of contract to other legal conceptions."[3]

But maybe the hunch that this can or ought to be done is wrong. It has been intimated that the way to "get" this subject is to dive right in.

> From Langdell to Fuller, contracts casebooks have plunged immediately into the parties' liabilities. . . . There is no preliminary skirmishing with the abstract question of "What is a contract?" This may be one of the several reasons why Contracts has always been among the most satisfactory courses in the curriculum.[4]

Long ago it was known *abeunt studia in mores;* and so nobody is very sure whether a contract is a factual occurrence or a legal abstraction, an agreement that is not a promise, a promise that is not an agreement, or an agreement that is a promise. Although "the theory of the English law of contract is contained in the doctrine of consideration,"[5] which is "strictly, however, only a requirement for making *promises* binding"[6] and "a consideration, properly speaking, can be given only for a promise,"[7] we teach it as a requirement of releases,[8] which are "the very reverse of a contract,"[9] to the trilling of canaries and flight of tomtits[10] discuss the doctrine along lines in which "the discharge was mistaken for a contract,"[11] and wonder whether an "act done" is a promise to do it.[12]

---

*Professor of Law, Brooklyn Law School; LL.B., LL.M.

[1]GRISMORE, PRINCIPLES OF THE LAW OF CONTRACTS 1 (1947).

[2]FERSON, THE RATIONAL BASIS OF CONTRACTS AND RELATED PROBLEMS IN LEGAL ANALYSIS v (1949).

[3]ANSON, PRINCIPLES OF THE LAW OF CONTRACTS 1 (1939).

[4]Conard, *What's Wrong with Agency?*, 1 J. LEGAL EDUC. 540, 553 (1949).

[5]III HOLDSWORTH, A HISTORY OF ENGLISH LAW 413 (1926); *cf.* VIII *id.* at 3.

[6]Legal Doc. No. 65D at 272 (N. Y. Law Revision Comm'n 1936).

[7]POLLOCK, PRINCIPLES OF CONTRACT 185 (3d Am. & 7th Eng. ed. 1906).

[8]See any casebook.

[9]SALMOND, JURISPRUDENCE 361 n. (d) b (8th ed. 1930); Stiebel v. Grosberg, 202 N.Y. 266, 95 N.E. 692 (1911).

[10]Couldery v. Bartrum, 16 Ch. D. 394, 399 (1881); Wright, *Ought the Doctrine of Consideration to be Abolished from the Common Law?*, 49 HARV. L. REV. 1225 (1936).

[11]FERSON, *op. cit. supra* note 2, at 173.

[12]Huo Chin Yin v. Amino Products Co., 141 Ohio St. 21, 46 N.E.2d 610 (1943).

These exemplifications of "'the principle of linguistic contamination'"[13] call to mind Professor Kocourek's story about the collector of turtles. That admirable character one day captured a devilish little specimen which took his affections by storm. Though he could not classify the little fellow, he knew it was not a turtle. Nothing daunted, he made a new class of turtles, turtles which are not turtles—the non-turtle turtles.

And why should he not? The lawyers do it all the time. "Radically different notions are classified under the same term"[14] and "such ambiguity and confusion are peculiarly incident to the use of the term 'contract'"[15]

Wesley Newcomb Hohfeld arraigned "chameleon-hued words"[16] especially for not "differentiating purely legal relations from the physical and mental facts that call such relations into being;"[17] and Albert Kocourek has said that "the law is filled with anesthetic explanations and anesthetic words. They conceal the pain of thought, but they must be resorted to again and again because there is something persistent about truth; it is a fury that gives no rest and it exacts a heavy penalty of any society that seeks to put it down."[18]

But who cares about these, perhaps zealous utterances? Though standard practice "must often give rise to indistinctness of thought,"[19] we are in hot pursuit of "reason and justice." So what difference does it make? However, let us see whether, in the midst of a culture which "attacks distinctions as such,"[20] anybody bothers to make definitions any more.

The Impulse to Define

The fifth edition of Williston's casebook[21] has just come to hand. This one has an introduction in which the first topic is "Definition of a Contract." The third edition of Patterson and Goble[22] also has just come to hand. The third question in the first suggestive note after the first case is, "Do you find any words of promise in the circular?" Shepherd's second edition[23] has at the top of the first case an introductory note containing a definition of a contract said to be "both accurate and helpful." Fuller,[24]

---

[13]Hohfeld, Fundamental Legal Conceptions 70 (1928).
[14]Hertzog v. Hertzog, 29 Pa. 465, 467 (1857).
[15]Hohfeld, *op. cit. supra* note 13, at 31.
[16]*Id.* at 35.
[17]*Id.* at 27.
[18]Kocourek, Jural Relations iii (1927).
[19]Hertzog v. Hertzog, *supra* note 14, at 467.
[20]Russell Lynes in Harper's Magazine 21 (Feb. 1949)
[21]Williston, Cases on Contracts (5th ed. 1949).
[22]Patterson and Goble, Cases on Contracts (3d ed. 1949).
[23]Shepherd, Cases and Materials on Contracts (2d ed. 1946).
[24]Fuller, Basic Contract Law (1947).

who "is even more eager to get to the essence of the matter," does struggle away over to page 96 before he breaks down. There he gives two pages of text and some charts on "The Distinction between 'Contract' and a Present Transfer of Property by Agreement."

The treatises and textbooks are even more ghastly. Williston's monumental work[25] devotes the first four sections to definitions. Anson threatens to define contract in section 1 but restrains himself until he gets to section 2. In Pollock, no definition is accomplished until the second sentence. But Richardson[26] succumbs right now with a definition in the very first sentence. Ferson's and Grismore's recent books are not a bit better. Chapters 1 and 2 of Ferson fairly reek with basic conceptions, types, forms, and definitions. Grismore begins in section 1 and in section 2, starting on page 1, he really "goes to town."

The courts too have the habit. They were defining when Edward VI reigned[27] and are still at it in the days of Harry Truman.

Meditating upon these things, one by degrees feels himself more firm. Taking a definition seriously may after all not be the mere manifestation of an infantile longing for intra-uterine "harmony and serenity."[28] Anyway, the company indulging is too numerous and eminent for the practice to be unworthy of that decent respect which is owing to the opinions of mankind.

Definitions of Contract

The definitions arrange themselves into three groups: (1) that a contract is an agreement;[29] (2) that a contract is a promise;[30] and (3) that a contract is both.[31] All emphasize that there must be two or more parties and that there must be the added element of legal obligation.

These definitions embrace four elements: agreement, promise, law, and obligation; which reduce to three: facts, law, and obligation; or, since

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[25]Williston, Contracts (Rev. ed. 1936).

[26]Richardson, The Law of Contracts (5th ed. 1940).

[27]Plowd. 5 (1551).

[28]Frank, Law and the Modern Mind 14 (1930).

[29]Southern Ry. v. Huntsville Lumber Co., 191 Ala. 333, 67 So. 695, 696 (1914); Tucker v. Pete Sheeran Bro. & Co., 155 Ky. 670, 160 S.W. 176, 178 (1913); Ashcroft v. Butterworth, 136 Mass. 511, 514 (1884); Wilcox v. Cherry, 123 N.C. 79, 31 S.E. 369, 370 (1898); Binns v. Isabel, 72 Ohio App. 222, 51 N.E.2d 501, 503 (1943).

[30]Finlay v. Swirsky, 103 Conn. 624, 131 Atl. 420, 423 (1925); Port Huron Machinery Co. v. Wohlers, 207 Iowa 826, 221 N.W. 843, 844 (1928); Griener v. Greiner, 131 Kan. 760, 293 Pac. 759, 762 (1930); Restatement, Contracts § 1 (1932); Holmes, The Common Law, 289 (1938).

[31]Sturges v. Crowninshield, 4 Wheat. 122, 197 (U.S. 1819); Preston Co. v. Funkhouser, 261 N.Y. 140, 184 N.E. 737 (1933); 2 Bl. Comm. 442; 2 Kent Comm. 450.

it is widely stated that "every agreement and promise enforceable by law is a contract,"[32] to two: facts and enforceability. "It is the agreement plus the law that makes the . . . contract."[33] "A contract . . . does not contemplate simply the act of promising, but obligations arising therefrom."[34] "Many agreements do not produce any legal effect on the relations of the parties."[35]

Enforceability

The law is a body of directions which courts follow in saying to what human beings and how the public force shall be applied. In the field of contract, it operates through remedies. "If there is not a legal remedy, there is no contract;"[36] or, as the Restatement puts it, "a contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[37] More plainly, there is enforceability when the agreement or promise is one which "the law sanctions . . . and puts its coercive machinery behind it,"[38] one "which the law will enforce."[39] But what is enforcement?

Affirmative Enforcement

The prototypal idea is that the law "will step in and compel A to perform that promise or pay damages for not doing so."[40] In short, in case of breach, an action for affirmative relief may be brought.

Negative Enforcement

Suppose then that A and B, being in *vinculum juris,* make a "substituted" promissory agreement snipping that tie, and later B sets it up as a defense in an action by A on the original obligation; and B wins. Is that enforcing the second agreement? The question sounds querulous, since, if the second agreement is not kept, a separate action can be brought; its defensive assertion may be likened to establishing a set-off; and so it is an agreement for the breach of which remedy in the prototypal sense is afforded. But suppose that A and B, being in *vinculum juris* on a good bilateral contract, rescind by mutual consent, and later B sets up the rescission as a defense in an action by A on the former contract; and B wins again. Is that enforcing the agreement of mutual release? There

---

[32]Pollock, *op. cit. supra* note 7, at 2.
[33]Tullgren v. Amoskeag Mfg. Co., 82 N.H. 268, 133 Atl. 4 (1926).
[34]Port Huron Machinery Co. v. Wohlers, *supra* note 30.
[35]Tucker v. Pete Sheeran Bro. & Co., *supra* note 29.
[36]Richardson, *op. cit. supra* note 26, at 1.
[37]Restatement, Contracts § 1 (1932).
[38]Grismore, *op. cit. supra* note 1, at 2.
[39]Pollock, *op. cit. supra* note 7, at 1.
[40]Grismore, *op. cit. supra* note 1, at 1.

seems to be no opportunity to slide around the point by means of any "could be" supposition that B might have maintained a separate action for affirmative relief, or that, on the defense, he in truth establishes a set-off; for it seems that he could not do the one and does not do the other.

The matter would not be important, were it not that an unconscious assumption on the point has touched off bewildering chain reactions like the following: "This is an agreement. If an agreement is enforceable, it is a contract. Courts uphold agreements like this one. Hence, it is a contract. Since it is a contract, there must be consideration." Releases and accord-and-satisfactions, especially, have detonated such mental repercussions.[41]

Yet, if enforceability by action for affirmative relief alone is the kind of legal recognition which makes an agreement a contract, the notion that, for instance, a release is a contract is impossible. What gives plausibility to the thought that it is a contract is the unnoticed assumption that upholding a release in court is enforcing it.

Is it? While affirmative relief for breach of contract is a judgment for damages in many cases, the law may "compel A to perform that promise;" and, though specific performance is regarded as exceptional, it is not necessary to get into equity to have it granted. In unconditional, unilateral contracts to pay money, it is the normal method;[42] the debtor is compelled at law to do what he agreed to do. Likewise, when a "substituted" promissory agreement, a mutual rescission, or a release is upheld in court as a defense, a party is compelled too to do what he agreed to do; the law sanctions that agreement and puts its coercive machinery behind it. The forms of action, which produced affirmative enforceability of contracts, provided for negative enforceability too.

However, if we say right out that sustaining an agreement as a defense is enforcing it by giving a remedy for its breach, the proposition is repulsive. We wince at the thought of having to call the plaintiff's conduct a breach. When we speak of enforceable agreements being contracts, we think of actions for affirmative relief.[43]

---

[41]FERSON, *op. cit. supra* note 2, c. 8; Fallon, *The Nature of a Release,* 11 TEMP. L. Q. 179 (1937); Ryan v. Ward, 48 N.Y. 204 (1872).

[42]GRISMORE, *op. cit. supra* note 1, at 297; SALMOND, *op. cit. supra* note 9, at 131; RESTATEMENT, CONTRACTS § 387b (1932).

[43]GRISMORE, *op. cit. supra* note 1, at 1; Snyder v. Fidler, 125 Iowa 378, 101 N.W. 130, 132 (1904); Ticknor v. Kennedy, 3 Abb. Pr. (N.S.)387 (N.Y. 1867); Emery v. Emery, 9 How. Pr. 130, 132 (N.Y. 1854).

What is enforceability and what does it make an agreement? Here is a puzzle. Contracts are said to be agreements enforceable by law.[44] Yet agreements which give rise to legal rights-duties enforceable by action for affirmative relief, as grants, gifts, assignments, barters, are said not to be contracts,[45] while the negative enforcement of releases creates the impression that they are promises and, hence, contracts.[46] Is a discharge something, the performance of which the law in some way recognizes as a duty?

Agreements

The factual basis of contractual obligation includes facts which are not acts, *i.e.,* things and events.[47] However, there must be an act. An agreement or promise is an act.[48]

While it sounds a little strange to call an agreement an act, this is so only because an agreement is a "two-sided"[49] or "bilateral"[50] act; and, when we speak of acts, ordinarily we think of "one-sided"[51] or "unilateral"[52] acts. When we speak of acts in the making of an agreement, we think of the one-sided or unilateral acts of the individuals.

A one-sided or unilateral act is one in which "the will of one party is active,"[53] in which "there is only one party whose will is operative."[54]

A two-sided or bilateral act is one in which "there is a concurrence of two or more wills to produce the effect of the act,"[55] "one which involves the consenting wills of two or more distinct parties."[56]

The nature of one-sided acts has been abundantly analyzed; but "a similar analysis is not carried out for contracts."[57] However, it may be helpful to take a brief look at unilateral acts.

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[44]Anson, *op. cit. supra* note 3, at 10; Pollock, *op. cit. supra* note 7, at 7.

[45]Ferson, *op. cit. supra* note 2, c. 2; Grismore, *op. cit. supra* note 1, at 2; Anson, *op. cit. supra* note 3, at 4; Pollock, *op .cit. supra* note 7, at 6, 186; Fuller, *op. cit. supra* note 24, at 96; Dickinson, *Gratuitous Partial Assignments,* 31 Yale L. J. 1 (1921).

[46]Ferson, *op. cit. supra* note 2, at 173, citing Ames, *Two Theories of Consideration,* 12 Harv. L. Rev. 515 (1899); Fallon, *op. cit. supra* note 41; Salmond, *op. cit. supra* note 9, at 361 n. (d) b; *see* Huo Chin Yin v. Amino Products Co., *supra* note 12, at 615.

[47]Kocourek, *op. cit. supra* note 18, at 280; Holland, The Elements of Jurisprudence 106 (12th ed. 1917).

[48]Kocourek, *op. cit. supra* note 18, at 269; Salmond, *op. cit. supra* note 9, at 361; Holland, *op. cit. supra,* note 47, at 123, 255.

[49]Holland, *op. cit. supra* note 47, at 123.

[50]Salmond, *op. cit. supra* note 9, at 361.

[51]See note 49 *supra.*

[52]Salmond, *op. cit. supra* note 9, at 361.

[53]See note 49 *supra.*

[54]Salmond, *op. cit. supra* note 9, at 360.

[55]See note 49 *supra.*

[56]See note 50 *supra.*

[57]Kocourek, *op. cit. supra* note 18, at 270.

Unilateral Acts

In unilateral acts, one party acts and the other is acted upon. Analysis arrives invariably at an irreducible minimum of voluntary bodily movements.[58] As has been said, "an act is always a voluntary muscular contraction, and nothing else"[59] but is "a muscular contraction and something more. A spasm is not an act. The contraction of the muscles must be willed."[60]

There is diversity of opinion, however, as to whether the effect on the party acted upon of the actor's voluntary bodily movements is part of his act.[61] Taken at large, this problem seems insoluble; for it is as impossible for us to rid our minds of the notion that what a man does, when he swings his arms around without discernible effect, actual or potential, on anybody else, is an act, as it is for us to believe that in a slaying the act is pulling the trigger and not the killing. But, in the realm of legal cognizance, an act is "a movement of a human being having external effects."[62] We start with the effect and trace back to the causal "act." We do not start with the "act" and go running around looking for an effect.[63] Hence, "it is of little practical importance whether we think of liability for causes or whether we think of it as imposed for effects."[64] The knotty problems concerning acts arise, because "it is almost universally accepted among lawyers that the distinction between intentional and unintentional acts is a necessary one for legal analysis."[65]

That, for legal liability to ensue, the bodily movements must be voluntary is plain. The seizure of an epileptic or the behaviour of a somnambulist is not an act entailing obligation. When the butcher is mulcted, because the meat had trichinae in it, regardlessly of what he knew or could have known, he must still have voluntarily sold the meat; he would not be liable, were it stolen from him or taken by force. However, not only does physical causation, between the bodily movements and the consequences, matter but also the element of the actor's foresight of these consequences. With respect to this factor, acts seem to fall into three rather than into two groups.

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[58] *Id.* c. 16; SALMOND, *op. cit. supra* note 9, c. 17; HOLLAND, *op. cit. supra* note 47, at 116-124; HOLMES, *op. cit. supra* note 30, at 54, 91.

[59] HOLMES, *id.* at 91.

[60] *Id.* at 54.

[61] See note 58 *supra.*

[62] KOCOUREK, AN INTRODUCTION TO THE SCIENCE OF LAW 268 (1930).

[63] KOCOUREK, JURAL RELATIONS 269, 275 (1927); HOLLAND, *op. cit. supra* note 47, at 107.

[64] KOCOUREK, *id.* at 266.

[65] *Id.* at 262.

Unintentional Acts

Strictly unintentional acts are those in which the effect is not in fact foreseen[66] by the actor and his conduct is not regarded as intrinsically bad. These include ordinary acts of negligence and cases of absolute liability like that by statute for selling diseased meats without knowledge of that fact. In the first, the effect must be foreseeable; in the second, it need not be foreseeable.

Wilful Acts

Between strictly unintentional and strictly intentional acts, are wilful acts. In these also, the actor does not in fact foresee the effect of his behaviour. Sometimes, foreseeability of the effect is so very plain that his conduct is called wanton or reckless. In other cases, the actor knowingly does something extremely dangerous, or *malum in se,* although the effect which actually occurs may not be foreseeable. As to legal liability, wilful acts are usually treated the same as those in which the effect is in fact intended.

Intentional Acts

In strictly intentional acts, the actor actually foresees the effect. He need not desire it, although desire is frequently present in intention. Yet he must do more than foresee or expect it; he must make his voluntary bodily movements for the purpose of accomplishing the foreseen end. For instance, suppose a felon, disturbed in his depredations by some poor fellow's blundering upon him, were to say: "It's just too bad. It pains me no end but I am going to have to bump you off." Though he sincerely regrets the effect of pulling the trigger and verily hates the thought of it, he intends the death, as he would were it the one thing he most desired. In contrast, the surgeon, who knows the patient has one chance in a hundred and expects him to die, does not intend the death, if it follows, so long as there is a reasonable chance of success.[67]

Evidence and Intention

Foresight of consequences . . . is a picture of a future state of things called up by knowledge of the present state of things," yet, while this is very, very important in law, it has been suggested that the law is indifferent as to whether the actor "did actually foresee the consequences

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[66]In all illustrations, the initial effect which is the basis of liability is meant, not the consequences thereafter which affect the measure of damages. See Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

[67]Holmes, *op. cit. supra* note 30, at 53-54; Salmond, *op. cit. supra* note 47, at 394-395.

or not,"[68] being concerned only with evidence showing that he might have. Even with regard to wilful killings, for instance, and let alone negligent acts, this seems, however, to be the wrong hunch.

In felony-murder, the charge of which negatives the presence of any actual intent to kill, the legal consequences are identical with those in murder with deliberate and premeditated intent to kill. That does not make the two acts the same in fact, nor is the law careless of their diversity. While, on a charge of first degree in common law form, there can be a conviction of either felony-murder or d.p., there can be no conviction of d.p., where the charge is specifically felony-murder. If the jury find that the underlying felony was not committed but, however, the accused did actually intend to kill, they cannot find him guilty of d.p., nor of even second degree, *i.e.,* of killing with intent to kill but without deliberation and premeditation; they can convict only of manslaughter on that charge.[69] Moreover, on a charge setting out specifically an intent to kill, the law is not indifferent to whether the accused actually foresaw the effect of his act. It is true that knowledge of "the present state of things" indicating the accused might have foreseen is sufficient evidence to sustain a finding that he actually did foresee and intend the effect of his act; but that evidence does not require such a finding nor even justify it; it merely makes it possible. For there will be an instruction of the lesser degrees; only in the rarest case can this be avoided.[70] Suppose then an instruction is asked on the following point: If the jury believe that, notwithstanding this sufficient evidence, the accused did in fact not intend to kill, what verdict shall they then render? The instruction will be that they must believe he had in fact an intent to kill not merely that there is evidence he might have had. The law is not indifferent to or oblivious of the actual intention. The fact that two acts have the same price in law does not make them the same and full note is taken of this truth in law, as it is in common sense.

The Act of Agreement

"The word *agreement* imports a mutual act of two parties. . . ."[71] An agreement is a "union of two or more minds in a thing done or to be done."[72] Its essence is a "union of wills."[73]

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[68]Holmes, *op. cit. supra* note 30, at 53-54.
[69]People v. Nichols, 230 N.Y. 221, 129 N.E. 883 (1921); People v. Sullivan, 173 N.Y. 122, 65 N.E. 989 (1903).
[70]People v. Schleiman, 197 N.Y. 383, 90 N.E. 950 (1910).
[71]Packard v. Richardson, 17 Mass. 122, 131 (1821).
[72]Carter v. Prairie Oil & Gas Co., 58 Okla. 365, 160 Pac. 319, 322 (1916).
[73]VIII Holdsworth, A History of English Law 1 (1926).

The union of wills is not, however, like that between two who get together and jointly act upon a third. In the bilateral act of agreement,[74] the states of mind of the two actors are not identical but correlative and the action not simultaneous but successive. "The manifestation of mutual assent almost invariably takes the form of an offer or proposal by one party accepted by the other party or parties. . . . This rule is rather one of necessity than of law."[75] The offeror acts and then the offeree acts responsively. This reciprocating operation is the reason why the rare case of crossed offers[76] does not in fact amount to an agreement; neither party at the time he acts feels the impulse of the other's act; the actions are parallel and unrelated; the act of neither the consequence of the act of the other.

"It is essential . . . that the acts manifesting assent shall be done intentionally."[77] The offer must be made intentionally and the offeree must accept intentionally.[78] Herein is the difference between the unilateral act in the tort of deceit and the bilateral act of agreement, in both of which both parties are active. In the tort, the defendant does act intentionally but the plaintiff does not freely respond, since his will is impaired by the deception and he is in reality acted upon. Thus the act of agreement is bilaterally intentional.

The act of the will of each party must be manifested by an overt act.[79] Silence ordinarily does not suffice; but sometimes it does, if the party intends that it shall.[80] But the actual agreement of the offeree with the offeror, not the particular form in which it is manifested, is what counts.

> A contract is the thing upon which two or more people agree. Contracts frequently are reduced to writing and, when this is done, the writings are generally referred to as contracts. The writings are, however, not contracts, but written evidences of contracts.[81]

Impositive Facts

"Every right involves a title or source from which it is derived,"[82] "certain facts or events by the operation of which the right has become

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[74]SALMOND, *op. cit. supra* note 9, at 362 n. (f). All agreements are bilateral, although the contract, or contractual obligations resulting, may be either bilateral or unilateral.

[75]RESTATEMENT, CONTRACTS §22a (1932).

[76]See FERSON, *op. cit. supra* note 2, at 90-98.

[77]RESTATEMENT, CONTRACTS § 20a (1932).

[78]*Id.* §§ 25, 52, 55; *cf.* SALMOND, *op. cit. supra* note 9, at 363.

[79]RESTATEMENT, CONTRACTS § 20a (1932).

[80]*Id.* § 72. Perhaps silence under such circumstances is an overt act.

[81]Southern Ry. v. Huntsville Lumber Co., *supra* note 29.

[82]SALMOND, *op. cit. supra* note 9, at 357.

vested in the owner."[83] These facts are "the *de facto* antecedent, of which the right is the *de jure* consequent;"[84] and they "received from Bentham the corresponding name of *investitive facts*."[85] Since, however, "there can be no right without a corresponding duty,"[86] these facts are also impositive facts. Considered from the standpoint of enforcement, an agreement then is a set of impositive facts.

It may be contended that an agreement is not an act, because it is considered that only unlawful acts, namely, those in which the factual consequences are harmful, are really acts.[87] And making an agreement is regarded as neither unlawful nor harmful. However, many transactions which the law recognizes, as making a will, a grant, an assignment, or a release, are not regarded as harmful and yet are clearly recognized to be acts.[88] Furthermore, if detriment is insisted upon, it is an integral part of our law of contract; "the theory of the English law of contract is contained in the doctrine of consideration."[89]

It may be demurred that the mere mental effect of agreement is not enough. This is a variation of the harm-done conception, and probably a hangover from the mark-on-the-body rule in tort negligence. But mental effects are enough many times. Being put in fear is an assault. Here, while there must be outward manifestation of the mental state, the necessary harm is the mental state itself and not merely the evidence of acting as if in fear.

Especially is it asserted that it is not the actual state of the parties' minds which counts. "The making of a contract," we are told, "does not depend on the state of the parties' minds, it depends on their overt acts."[90] "The only intent of the parties to a contract which is essential is an intent to say the words and do the acts which constitute their manifestations of assent."[91] "Not mutual assent but a manifestation indicating assent is what the law requires."[92] "The mental assent of the parties is not requisite for the formation of a contract."[93]

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[83] *Id.* at 241; *cf.* HOHFELD, *op. cit. supra* note 13, at 27.
[84] SALMOND, *op. cit. supra* note 9, at 357.
[85] *Id.* at 358; *cf.* KOCOUREK, JURAL RELATIONS 199, 201, 236 (1927).
[86] SALMOND, *op. cit. supra* note 9, at 240; KOCOUREK, JURAL RELATIONS 21 (1927); HOHFELD, *op. cit. supra* note 13, at 38; HOLLAND, *op. cit. supra* note 47, at 86.
[87] KOCOUREK, JURAL RELATIONS 269 (1927).
[88] *Ibid.*; SALMOND, *op. cit. supra* note 9, at 361; HOLLAND, *op. cit. supra* note 47, at 219.
[89] III HOLDSWORTH, *op. cit. supra* note 5, at 413.
[90] HOLMES, *op. cit. supra* note 30, at 307.
[91] I WILLISTON ON CONTRACTS § 21 (Rev. ed. 1936).
[92] RESTATEMENT, CONTRACTS § 20a (1932).
[93] *Id.* § 71a.

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a know intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. Of course, if it appears by other words or acts of the parties that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent.[94]

Evidential and Operative Facts

This conjures up pictures of people winking in auctions and exchanging bits of typewriting through the mails, with the law concerned only as to whether they intend to wink or mail the letters and unconcerned as to what they actually intend to accomplish thereby. The somewhat hilarious potentialities of such a view are indeed seductive; but difficulties arise, when it comes actually to believing that, if an offeror wafts an offer to the offeree, all that matters is whether or not the offeree waves back. As Wesley Newcomb Hohfeld once noted,

> it seems necessary . . . to lay emphasis upon another distinction inherent in the very nature of things. The facts important in a relation to a given jural transaction may be either *operative* facts or *evidential* facts.[95]

The courts are concerned with the operative fact of actual agreement. In contract, they make unapologetic search for the actual intention, as they do in crime and tort.

It is true that the only evidence of intention consists in its outward expression. However, if at the time he entered into an alleged agreement, a party made no manifestation of intention other than by the words used and there are no surrounding circumstances showing that he could not have meant, or probably did not mean, what he said, it is not too clear how twenty, or any other number, of bishops can know that he had an intention different from that which ordinarily accompanies those words.

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[94]Hotchkiss v. National City Bank, 200 Fed. 287, 293 (S.D.N.Y. 1911), *aff'd*, 231 U.S. 50 (1913).

[95]HOHFELD, *op. cit. supra* note 13, at 32.

The evidence must come from the party's own manifestations at a different, most likely later, time or from surrounding circumstances; and the question is primarily one of credibility and probative value. If there is persuasive evidence of a different intention in fact, such as "mutual mistake, or something of the sort"—nor need the other party know[96] of any discrepancy between words and thought; in mutual mistake, neither ever does, the question of actual intention does arise and is dealt with. This is what the law on fraud, mistake, duress, and the like means, if it means anything.

It is true that a court or jury may find that an intention did exist, and be mistaken. But it is not true that they usually are; nor is anybody "kidded" that everyday assumptions, that thought and deed usually coincide and that the ordinary meanings of words are sufficiently clear for even lawyers to understand, are false. If they were, we should all stop eating pretty quick. In the overwhelming majority of agreements, not only of those made but also of those which get into courts, the parties do intend just what they say. Issues are usually on other points and nobody has the "nerve" to raise one on intention. While the parties may be surprised at the form and measure of the legal obligation imposed on the basis of their transaction, the tort-feasor and criminal often are too; but that does not prove that the rapist, second degree, did not intend to penetrate.

It might be well to desist for a while from trying to key our understanding of agreements to the sports, and rather to meditate some on the species of genuine agreements.

It is true too that the law sometimes imposes the same, or similar, obligation on the basis of one type of impositive facts as it imposes on the basis of another type. But the same price in law does not make the two types of facts the same any more than the same price in a store makes two articles the same. In the store and in the law of crime and tort, we usually know this. In the law of contract, we not infrequently forget.

Actual Agreement or No?

Unessential Discrepancies in Knowledge

"Error or mistake . . . is distinguishable as *essential* and *unessential*."[97] Most agreements are not the vagaries of immaturity, of mental incompetency, or of temperament. Most agreements are made by what are called reasonable men. If an adult is fit to be at large, it is factual to

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[96] *Cf.* Restatement, Contracts § 71a (1932).
[97] Salmond, *op. cit. supra* note 9, at 370.

believe he knows that little differences in understanding always are occurring and that, if he waits for perfect knowledge, he will seldom act at all. Consequently, it is not only fair but also true to fact to believe such people make their agreements with full realization of the contingencies of the facts of life. Thus, when viewed from the standpoint of the rough-and-ready approximations by which we needs must live rather than from that of some sophisticated pseudo-realism, speculative ideal, or passionate morality, many mistakes of fact, differences in interpretations of words or acts, and even little white lies do not prevent "a true *consensus ad idem*."[98]

The mailed-acceptance in cases of bilateral contracts and the acceptance in unilateral contracts like that where an order is sent and the seller accepts by shipping the goods, have occasioned some difficulty, because at the time acceptance is made the offeror does not know about it.[99] However, the union of wills, in coming to an agreement, is by reciprocal not simultaneous action; and, in bilateral acts as in all acts, there is a time-lag between the initiation and the consequences. Suppose, for instance, a man sets a spring-gun. Must he know at the time the gun goes off and kills his victim that he has been successful in accomplishing the intended result? There seems to be no real need for a different view where the intended consequence is the intentional response of the other party.

Two other situations are tougher. These are: that of the fellow who, being subjected to no chicanery and having full opportunity to inform himself, signs a paper without knowledge of its contents; and that of "an offeree, knowing that an offer has been made to him but not knowing all its terms . . . accepts whatever terms it contains."[100] Here there seem to be true agreements, since, in intention, the will has a bigger part than mere knowledge or understanding. We quite often act without full knowledge. Doing so is all too human. Perhaps, it were better to say that, in such agreements as these, the party intentionally assumes the risk; he intends to stand by the words, though he may be surprised later at just what he has done.

Big Discrepancies in Knowledge

In a case of mutual mistake, misrepresentation, or fraud, it is recognized that there is no genuine agreement in fact. In some instances, it is clear that there is no agreement in fact at all. In others, that an agreement exists but is defective and to be genuine must await confirmation by a party after his defect of knowledge is repaired.

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[98] *Ibid.*

[99] FERSON, *op. cit. supra* note 2, at 136-142; HOLLAND, *op. cit. supra* note 47, at 268-270; HOLMES, *op. cit. supra* note 30, at 305-306; Port Huron Machinery Co. v. Wohlers, *supra* note 30; Haarstick v. Fox, 9 Utah 110, 33 Pac. 251, 254 (1893).

[100] RESTATEMENT, CONTRACTS § 23a (1932).

Infirmities of Will

In a case of duress or undue influence, it is recognized that there is in fact an agreement of a sort, when the party does know what he is doing. But the agreement is defective and to become genuine must await that party's renewed adherence, after the force overcoming his will has ceased to operate. However, if the party does not know the nature of the transaction, for instance the nature or contents of the paper he signs, it is recognized that there is no agreement in fact at all. *Void* here has a meaning different from that in the phrase *void as against public policy,* as it does in a case of mutual mistake or fraud in the execution.

Errors in Transmission

Where an offer is sent by telegraph, for instance, and an error occurs in transmission, or where one party understands the overt acts one way and the other party another way, there is no actual agreement. The obligation imposed is not based on any pretended agreement but upon what are called equitable grounds.[101]

Estoppel

A promissory estoppel is a sort of half-way agreement, since, for any act to be intentional, the intention must extend through the full range of the impositive facts.[102] Hence, in the bilateral act of agreement, both parties must intend all the facts upon the basis of which obligation is imposed. That such is the case is plain, where a consideration is given; the consideration must be "bargained for and paid,"[103] "actually given and accepted."[104] But, in a promissory estoppel, the essential detrimental reliance is selected by the promisee alone; it need be only foreseeable, as must the harm in tort negligence.[105]

There is an estoppel conception of a sealed instrument, according to which the document is regarded as conclusive evidence of an obligation therein set out, in which there is an actual agreement in the delivery and acceptance of the bond.[106] But what is meant here is an offer made in jest, braggadocio, or anger which "does not truly indicate the mind of the actor but the person to whom the act is addressed is reasonably misled by

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[101]Peerless Glass Co. v. Pacific Crockery etc. Co., 121 Cal. 641, 54 Pac. 101 (1898); Pepper v. W. U. Tel. Co., 87 Tenn. 554, 11 S.W. 783 (1889); Ayer v. W. U. Tel. Co., 79 Me. 493, 10 Atl. 495 (1887); Turner v. Webster, 24 Kan. 38 (1880); Rupley v. Daggett, 74 Ill. 351 (1874); Fullerton v. Dalton, 49 N.Y. 659 (1872).

[102]SALMOND, *op. cit. supra* note 9, at 394.

[103]RESTATEMENT, CONTRACTS § 75b (1932).

[104]POLLOCK, *op. cit. supra* note 7, at 186.

[105]See Snyder, *Promissory Estoppel in New York,* 15 BROOKLYN L. REV. 27 (1948).

[106]KEIGWIN, CASES IN COMMON LAW ACTIONS 31, 35 (1928).

it . . . and the actor is held according to his act."[107] Obligation in such a transaction, if imposed, is not based on any actual agreement, since there is none.[108]

Delivery of Written Instruments

With respect to written instruments, it is sometimes said that no acceptance is necessary and, hence, that no agreement is necessary.[109] Cases referred to fall into three patterns: (1) those in which a grantor or maker dies before the grantee or payee knows; (2) those in which something like an insurance policy is executed but not delivered; and (3) those involving a presumption of acceptance.

(1) In situations like the following, the instruments have been held to be effective: a deed is executed, recorded, and mailed but the grantor dies before the grantee receives it;[110] a note is sealed in an envelope, delivered to the payee with instructions not to open until after the maker's death, and the payee complies.[111] These cases are much like that in which the offeror dies and the offeree "accepts" without knowledge of that fact.

In the latter instance, there is considerable authority to the effect that the death of the offeror does not revoke the offer.[112] And nothing in the nature of an act, nor in the conception of a legal person, requires any holding that it does. The difficulty is one of applying the sanctions.

For an act to be intentional, the actor must intend the consequences at the time he acts; but there is no necessity of his knowing that they happen at the very time they do happen; nor of his ever knowing. Suppose an assailant shoots his victim and then himself but the assailant dies first. While his death prevents the application of the criminal sanction, does it defeat a wrongful death action? It is true that a man is liable for the consequences of his acts and that, if there is none, he is not liable. Yet what he does precedes its consequences, and sometimes by quite a spell. Though the act must be done during his life, it does not necessarily follow that the consequences too must occur while he is still alive. If the actor drops dead after he has sped the arrow but before it hits, the hitting is still the actual consequence of his act, and an intentional consequence if that was his state

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[107] FERSON, *op. cit. supra* note 2, at 70.

[108] *Id.* at 71, quoting Nyulasy v. Rowman, 17 Vict. L.R. 663 (1891); see also *id.* at 65. The real question is, Is the obligation actually contractual? There can be vast differences in the measure of recovery, the period of limitation, and in the application of the Statute of Frauds and the parol evidence rule.

[109] POLLOCK, *op. cit. supra* note 7, at 7, 55; FERSON, *op. cit. supra* note 2, at 11; GRISMORE, *op. cit. supra* note 1, at 142.

[110] Taylor v. Stanford, 108 Tex. 340, 193 S.W. 661 (1917), cited in FERSON, *op. cit. supra* note 2, at 12.

[111] Dean v. Carruth, 108 Mass. 242 (1871); Worth v. Case, 42 N.Y. 362 (1870).

[112] FERSON, *op. cit. supra* note 2, at 112.

of mind when he let it fly. This is true to fact in a unilateral act of tort or crime. Nor does it become untrue to fact in a bilateral act, merely because the intended reaction is active.

Neither in tort or crime, in the instance of an offer, nor in the instance of initiating the delivery of a deed or a note, is it necessary to presume that, had he remained alive, the actor would have undone his act before the consequences ensued. The consequence always follows the act; the offer precedes the acceptance; the deliveror's act precedes the deliveree's; the time-lag is only more noticeable in some cases. Yet it is patently manifest in the mailed-acceptances and, in these, there is also want of knowledge on the part of the actor of the consequences at the time they occur. But the thought enters that it is not the time-lag nor the want of knowledge which counts; but the fact that, in an agreement, there is nobody at the other end any more, when the second person makes his correlative response.

However, men's deeds do live after them in fact; in law too. With regard to torts and agreements made, "the persona of the 'defunctus' survives" an individual's death,[113] though all the consequences of his acts have not ensued while he remained alive. There is an hiatus until the personal representative is qualified; there is a difference in applying sanctions; but the estate is bound and the representative administers it as a prolongation of the decedent's legal personality. There seems to be no overpowering need of making a difference between the instance where the consequences of the decedent's act have begun but are not complete and the instance where the dead man did all that he could or would have done and everything was as much out of his control whether he dropped dead the moment before the acceptance was mailed or the deed received, or the moment after.

In the cases of the deed and note, the second party did assent. There was in fact the reciprocal action which occurs in all agreements. The thought that these cases show no acceptance is necessary is on a par with saying, after the gun cracks and while the ball is in the air on that vital last point-after-touchdown but before it crosses the bar, that the ball does not need to go between the uprights and above the bar for it to be counted.

(2) When an insurance company executes a policy and entrusts it to its secretary for delivery to the insured but the policy remains at all times with the secretary;[114] and when a bank assigns a note of a third person, makes appropriate entries in its books, and places the note in an

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[113]Kocourek, Jural Relations 300 (1927).

[114]Roberts v. Security Co., [1897] 1 Q. B. 111, cited by Grismore, *op. cit. supra* note 1, at 141; see also Xenos v. Wickham, L.R. 2 H.L. 296.

envelope belonging to the assignee but in the bank's custody[115] . . ., the transactions are very much like the appropriation of the goods to a previously made contract to sell. Commercial specialties are frequently "chattelized."[116] Nor does the thought that this view may be applicable to the assignment of the note, which had previous inception, but not to an insurance policy, appear to raise insuperable difficulties. An insurance policy is no mere simple contract;[117] in fact and in law it is often dealt with rather as a thing. In each case, there was a previous agreement, of which the issuance of the policy and the assignment of the note were the performance. Moreover, most deeds to land are but the performance of a previous contract; and the execution of the deed and its passing out of control of the grantor too is not unlike the appropriation of goods to a previous contract to sell. The trouble in such instances seems to lie in not looking in the right transaction for the agreement.

However, where there is no previous agreement and the grantor executes the deed, delivers it to the recorder with instructions to put it on record, and there matters end, with the grantee dying in total ignorance of it all, there is in fact no agreement anywhere.[118]

(3) The third class of these factual situations involves deeds to land.[119] There is, in such cases, a presumption of acceptance, when the act is beneficial to the grantee.[120] However, the grantee can disavow, when he learns of the deed, and then the act is undone.[121] These cases may involve only the matter of time-lag between the grantor's act and the grantee's acceptance, thus making the problem one merely as to the time when title passes, as in the relation-back process in deliveries in escrow. Sometime, somewhere, the grantee does learn and then does give his assent. If, before the grantee manifests assent but after the instrument has left the grantor's hands (and these deed-to-land cases do not appear to involve deeds which never left the grantors' hands), the grantor were to try to recall it, the question would be similar to one as to whether an offer is irrevocable; and the problem of communication of offers would then arise. Moreover, all this is of minor importance, since the presumption of acceptance is repudiated in many American jurisdictions.[122] Third-party-

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[115]Williams v. Galt, 95 Ill. 172 (1880).

[116]RESTATEMENT, CONFLICT OF LAWS § 349 (1934); GOODRICH, HANDBOOK ON CONFLICT OF LAWS 141-142 (2d ed. 1938); STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 224-236 (1937).

[117]RESTATEMENT, CONFLICT OF LAWS § § 317, 318, 319 (1934); APPLEMAN, INSURANCE LAW AND PRACTICE § § 7001-7019 (1943); VANCE, HANDBOOK OF THE LAW OF INSURANCE 14-18, 57-75, 201 (2d ed. 1930).

[118]Mitchell v. Ryan, 3 Ohio St. 377 (1854).

[119]POLLOCK, *op. cit. supra* note 7, at 55 n. 62; GRISMORE, *op. cit. supra* note 1, at 141 n. 27, 142 n. 29.

[120]POLLOCK, *op. cit. supra* note 7, at 6 n. 3; GRISMORE, *op. cit. supra* note 1, at 142.

[121]POLLOCK, *op. cit. supra* note 7, at 56.

[122]*Id.* at 6 n. 3; GRISMORE, *op. cit. supra* note 1, at 142.

beneficiary contracts and contracts which have been assigned present situations in which there is no agreement between the person seeking enforcement and the person against whom enforcement is sought.

In summary although most agreements met with in the law of contract are real agreements in fact, it is entirely clear that many sets of impositive facts containing no actual agreement have been called agreements.

Many agreements are promises but an agreement is not necessarily promissory. The content can be a "thing done" as well as a thing "to be done."[123] Grants, assignments, cash sales, barters, gifts, releases, and accord and satisfactions, for instance, are agreements, though not promises.[124]

Promises

Promises as Agreements

A promise seems *ipso facto* an agreement.[125] The promisee's assent in itself does not, it is true, render a promise enforceable; but it does appear to make the promise an agreement. A one-man promise has the earmarks of anomaly; somebody seems to be trying to make a promise rather than making one, if the promisee will have none of it.

Promises vs. Non-promissory Agreements

A promise is usually defined in terms of the legal obligations imposed rather than in terms of its factual content.[126] Rights *in rem* and rights *in personam* are distinguished.[127] This practice does not help much, since tort obligations also are rights *in personam*.[128] Then it is said that non-promissory agreements do not give rise to obligations, while promises do.[129] However, non-promissory agreements do give rise to obligations. What is meant is that the obligations are different and we are back to rights *in rem* and rights *in personam*. Next it is said that, in non-promissory agreements, the parties do not contemplate the future, whereas they do in promises.[130] But, in all agreements between men, 'they make arrangements for the future."[131] And it is said that, in non-promissory agreements, the parties *intend* one kind of obligation and in promises

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[123]Carter v. Prairie Oil & Gas Co., *supra* note 72.

[124]Anson, *op. cit. supra* note 3, at 4; Pollock, *op. cit. supra* note 7, at 186; Grismore, *op. cit. supra* note 1, at 2; Ferson, *op. cit. supra* note 2, c. 2.

[125]Salmond, *op. cit. supra* note 9, at 363 n. (f); Holmes, *op. cit. supra* note 30, at 299; *cf.* Grismore, *op. cit. supra* note 1, at 80.

[126]Holmes, *op. cit. supra* note 30, at 298.

[127]Salmond, *op. cit. supra* note 9, at 366.

[128]*Id.* at 486; Richardson, *op. cit. supra* note 26, at 2.

[129]Pollock, *op. cit. supra* note 7, at 186.

[130]*Id.* at 1.

[131]Holmes, *op. cit. supra* note 30, at 304.

another.[132] Yet the fact is that in both, they do not, as a rule, have in mind legal obligation at all; they are doing something in fact and that is what their minds are on.[133]

In a non-promissory agreement, the parties define only what they are doing at the time they make the agreement. They do expect future happenings but their minds are not directly upon them. In a promise, their minds are directly on some future happening and they define what it is to be.[134] The same thing is done in a prophecy, but a promise is something more. A promisor assures the promisee that he will cause the future happening to eventuate. And in so doing, he expresses not a flabby intention but an unequivocal determination.[135] "A promise then, is simply an accepted assurance that a certain event or state of things shall come to pass.[136]

Non-Agreement Promises

A promissory estoppel includes a promise but, as has already been noticed, is only a sort of half-way agreement, when all the impositive facts are considered. Sometimes it is sought also to smuggle gratuitous declarations of trust, which are not agreements, in among the promises.[137]

Non-Agreement, Non-Promise Promises

The fiction of a promise is often indulged where there is neither agreement nor promise in fact, as in the quasi-contracts and contracts so-called of record, judgments, recognizances, and civil penalties. These fictional promises are known not to be promises in fact.[138]

Actual Promises

It seems clear that the agreements in grants, gifts, cash sales, barters, and the like are not promises.[139] and that the engagement to inter-marry consists of mutual promises but that the contract of marriage is non-

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[132]SALMOND, *op. cit. supra* note 9, at 366

[133]GRISMORE, *op cit. supra* note 1, at 24.

[134]RESTATEMENT, CONTRACTS § 32a (1932).

[135]Talley v. Curtis, 23 Tenn. App. 181, 129 S.W. 2d 1099, 1102 (1939); Russell v. Sunburst Refining Co., 83 Mont. 452, 272 Pac. 998, 1008 (1928); Richmond Eng. & Mfg. Co. v. Loth, 135 Va. 110, 115 S.E. 774, 786 (1923); Steward v. Reckless, 24 N.J.L. 427, 430 (1854).

[136]HOLMES, *op. cit. supra* note 30, at 299.

[137]L.D. 65 D at 69.

[138]RICHARDSON, *op. cit. supra* note 26, at 4, 179, 206, 217; ANSON, *op. cit. supra* note 3, at 9, 22, 74-76; POLLOCK, *op. cit. supra* note 7, at 10-12; WOODWARD, THE LAW OF QUASI CONTRACT 1, 6 (1913); KEIGWIN, *op. cit. supra* note 106, at 28.

[139]FERSON, *op. cit. supra* note 2, c. 2; GRISMORE, *op. cit. supra* note 1, at 2; ANSON, *op. cit. supra* note 3, at 4; POLLOCK, *op. cit. supra* note 7, at 6, 186.

promissory.[140] And, notwithstanding some hangover from the proprietary conception of debt, it appears that, in sales on credit, loans, bank deposits, and the like, promises in fact are made.[141] Likewise, where services rendered are preceded by an actual request, there is an actual promise to pay for them.[142]

Question Marks

In actions for specific performance, promises to convey become grants, *i.e.,* in effect non-promissory agreements.[143] Moreover, in many transactions where agreements in fact are involved, there is a promissory aroma, though nobody seems to know whether the promises are legal fictions are actual facts. Examples, *inter alia,* are: relations such as those of bailor and bailee, passenger and carrier, and innkeeper and guest; restrictive covenants; licenses to enter upon land; services rendered with knowledge but without actual request; and the accessory engagements of covenants and warranties. Releases too have been abundantly argued about as being promises not to enforce.[144] Thus there are swept in among the promises various sets of facts which contain no promise. Sometimes, where there is an actual promise, there is in fact no complete agreement. In other instances, we are not sure whether or not transactions, which do involve actual agreements, contain also promises in fact. The obligation of a contract is the result of the law's operation on the impositive facts. The contract seems to include both. However, the obligation has been called the contract[145] and likewise the contract has been said to be the agreement or promise.[146]

What Difference Does It Make?

If no obligation is imposed, it makes no difference. If obligations are imposed but these differ with factual differences in the impositive facts, it does make a difference.

If A walks into B's store, picks up an article, and walks out, there may be either a sale on credit or a conversion. In any event, A's obliga-

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[140]Tiffany, Handbook on the Law of Persons and Domestic Relations 2-6 (3d ed. 1921).

[141]Keigwin, *op. cit. supra* note 106, at 27, 35.

[142]Grismore, *op. cit. supra* note 1, at 21; Hertzog v. Hertzog, *supra* note 14; Bartholomew v. Jackson, 20 Johns. 28 (N.Y. 1822).

[143]Salmond, *op. cit. supra* note 9, at 367.

[144]Ferson, *op. cit. supra* note 2, c. 8; Fallon, *supra* note 41; Hou Chin Yin v. Amino Products Co., *supra* note 12.

[145]Hotchkiss v. National City Bank, *supra* note 94; *cf.* Salmond, *op. cit. supra* note 9, at 361 n. (d) b. c; Woodward, *op. cit. supra* note 138, at 467.

[146]Preston Co. v. Funkhouser, *supra* note 31, citingOgden v. Saunders, 12 Wheat. 213 (U.S. 1827); Sturges v. Crowninshield, *supra* note 31; Dartmouth College v. Woodward, 4 Wheat. 517 (U.S. 1819); Fletcher v. Peck, 6 Cranch 87 (U.S. 1810).

tion is to pay for the article; and the evidence and actual results in dollars and cents will be practically the same, whatever legal hypotheses are utilized in the "inveterate practice among lawyers to use concepts in reasoning from various fact situations to their legal consequences."[147] If the evidence shows an actual promise, B cannot waive that but must recover in contract and the breach-of-contract statute of limitations applies. On the other hand, if the evidence shows a conversion in fact and B sues in tort, the tort statute of limitations applies. However, if the act is a conversion, B can waive the tort and sue in contract. Then, if the facts are the basis of decision, one statute of limitations is applied; if the legal hypothesis, or obligation, another statute of limitations. And the latter view is the one taken.[148]

Yet this view is not always followed. With respect to statutory double liability of stockholders[149] or statutory liability of an employer for minimum wages or overtime,[150] the obligation is quasi-contractual but the breach-of-contract statute of limitations is not applied. For that section to apply, it is said, there must be an actual promissory agreement.[151] The liability of a stockholder to pay his subscription, for instance, is carefully distinguished.[152] However, an action on a common count for money had and received, though expressly authorized by statute, comes within the breach-of-contract period of limitation.[153]

Promise or Non-Promise

In an action by the vendee for damages on a contract to convey land, the breach-of-contract period of limitation applies as does the contract measure of recovery. However, if he sues for specific performance, a different statute of limitations applies[154] and, likewise, a different method of measuring the damages granted incidentally to the decree.[155] The promise is considered to be a grant and the action one to recover land rather than one for breach of contract. Yet an action for specific performance has also

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[147]FERSON, *op. cit. supra* note 2, at 186.

[148]WOODWARD, *op. cit. supra* note 138, at 464, 467, 468.

[149]Royal Trust Co. v. MacBean, 168 Cal. 642, 144 Pac. 139 (1914); Platt v. Wilmot, 193 U.S. 602 (1904).

[150]Cannon v. Miller, 22 Wash.2d 227, 155 P.2d 500 (1945).

[151]See notes 149, 150 *supra;* People v. Speir, 77 N.Y. 144, 150 (1879).

[152]Royal Trust Co. v. MacBean, *supra* note 149.

[153]Geissman v. Comm'rs, 44 A.2d 862 (Md. App. 1945); School District v. Pondera County, 89 Mont. 342, 297 Pac. 498 (1931).

[154]Randolph v. General Investors' Co., 96 N.J. Eq. 227, 124, Atl. 765 (1924), *rev'd on other grounds,* 97 N.J. Eq. 493, 128 Atl. 156 (1925); Peters v. Delaplaine, 49 N.Y. 362 (1879). *Contra:* Thompson v. Rosehill Burial Park, 177 Okla. 422, 60 P.2d 756 (1936).

[155]CLARK, NEW YORK LAW OF DAMAGES § § 207, 906 (1925).

been held to be just an action for breach of contract and that statute of limitation applied.[156]

In cases of licenses for a consideration, such as those had by guests in inns, passengers on common carriers, patrons at theatres, and the like, the relations are established by actual agreements. Where the licensor makes a breach before the licensee has entered the premises, the damages appear to be contractual;[157] but, where the breach occurs after the licensee has entered the premises, the damages are tortious, whether the action is considered to be in contract or in tort.[158] Moreover, recently the tort statute of limitations has been applied.[159] On the other hand, it has been held recently also that a passenger may elect to sue in tort or in contract and by so doing may elect his statute of limitations.[160]

In bailments, an action for an agreed compensation is governed by the breach-of-contract statute of limitations;[161] and there is a genuine promise in such a case. Where an action for conversion is deemed to be one for injury to property, it has been held that, whether the action of the bailor for failure to re-deliver on demand is in contract or in tort, the same statute applied, but, either way, the period was then the same.[162] However, the tort conception has been stressed;[163] and, after the period for injury to property was reduced from six to three years, the three-year statute has been applied.[164] Yet an action against a bailee for negligence is said to be in contract and the breach-of-contract period of limitation to apply.[165]

In many bailments, genuine contracts, such as those to pay compensation or to enlarge the ordinary liability, do accompany the property relations. Also there may be agreements releasing normal liability in part. But the relation of bailment itself seems to be something like that which exists when property in land is carved up among different estates and in-

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[156]Thompson v. Rosehill Burial Park, *supra* note 154.

[157]Luxenberg v. Leith & Proctor Amusement Co., 64 Misc. 69, 117 N.Y. Supp. 979 (Sup. App. T. 1909); People v. Flynn, 189 N.Y. 180, 82 N.E. 169 (1907).

[158]Boyce v. Greeley Square Hotel Co., 228 N.Y. 106, 126 N.E. 647 (1920); Aaron v. Ward, 203 N.Y. 351, 96 N.E. 736 (1911); Smith v. Leo, 92 Hun 242, 36 N.Y. Supp. 949 (N.Y. Sup. G.T. 1895).

[159]See Thornton, *The Elastic Concept of Tort and Contract as Applied by the Courts of New York*, 14 BROOKLYN L. REV. 196, 199-201 (1948). See also Rentfro v. Dettwiler, 95 Mont. 391, 26 P.2d 992, 994 (1933); Metcalf v. Hart, 3 Wyo. 513, 27 Pac. 900 (1891) (A license is not a contract).

[160]Doughty v. Maine Cent. S. Co., 141 Me. 124, 39 A.2d 758 (1944).

[161]Houston & T.C.R.R. v. Lee County Produce Co., 14 F.2d 145 (S.D. Tex. 1926).

[162]Stephens v. Crawford, 209 App. Div. 142, 205 N.Y. Supp. 39 (2d Dep't 1924).

[163]McDonnell v. Buffalo L.T. & S.D. Co., 193 N.Y. 92, 85 N.E. 801 (1908).

[164]Mintzer v. Windsor Lamp Mfg. Co., 175 Misc. 551, 23 N.Y.S. 2d 990 (Sup. T.T. 1940).

[165]Louisville & N.R.R. v. Hall, 218 Ky. 528, 293 S.W. 1091 (1927).

terests; and the agreement, insofar as it establishes the bailment, to be a "contract executed which differs nothing from a grant."[166] Similarly trust agreements are not promises but grants, with appropriate effect on the statute of limitations.[167]

Restrictive covenants have been held to be within the Statute of Frauds[168] and not within the Statute of Frauds,[169] to be grants of property interests, for which compensation must be made in eminent domain proceedings,[170] and not to be such grants.[171] In an action for damages for the breach of such a covenant, apparently the breach-of-contract period of limitation[172] and a contractual measure of recovery[173] apply. Treated as grants in equity but promises at law, these covenants, in eminent domain proceedings which are neither actions in equity for specific performance nor at law for damages, are considered by some courts to be non-promissory agreements or grants and by other courts to be promises.

Covenants in deeds and leases are said to be agreements,[174] contracts of a special nature.[175]

> A covenant is an agreement duly made between the parties to do or not to do a particular act, or whereby either doth promise to the other that something is done already or shall be done afterwards, or a stipulation as to the non-performance of some specified duty, or a stipulation as to the truth of certain facts.[176]

However, a covenant to pay rent is a grant and creates no contractual obligation;[177] and, as to ground rents, it has been held that no statute of limitations applies.[178] Evidently, these covenants relate both to "things done" and "to be done" and yet, with regard to the latter, are not really

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[166]2 Bl. Comm. 443.

[167]Scott, The Law of Trusts § § 12.4, 12.11, 12.12 (1939).

[168]Marsh v. Cheeseman, 221 Ala. 390, 128 So. 796 (1930); Mueller v. Storrs, 212 Ky. 176, 287 S.W. 557 (1925); Sprague v. Kimball, 213 Mass. 380, 100 N.E. 622 (1913).

[169]Reeves v. Morris, 150 Kan. 231, 124 P.2d 488 (1942); Thornton v. Schobe, 79 Colo. 25, 243 Pac. 617 (1925); Hall v. Solomon, 61 Conn. 476, 23 Alt. 876 (1892); Lewis v. Gollner, 129 N.Y. 227, 29 N.E. 81 (1891).

[170]Flynn v. N.Y.W. & B. Ry., 218 N.Y. 140, 112 N.E. 913 (1916); *cf.* Snow v. Van Dam, 291 Mass. 477, 197 N.E. 224 (1933); Trustees v. Lynch, 70 N.Y. 440 (1877).

[171]Anderson v. Lynch, 188 Ga. 154, 3 S.E.2d 85 (1939); Norfolk & Western Ry. v. Gales, 119 Ohio St. 110, 162 N.E. 385 (1928), *cert. denied,* 278 U.S. 571 (1928).

[172]McCusker v. Goode, 185 Mass. 607, 71 N.E. 76 (1904).

[173]Clark, *op. cit. supra* note 155, § 190.

[174]Board of Education v. Mill Creek Methodist Church, 242 Ky. 147, 45 S.W.2d 1026, 1029 (1932); Gould v. Wallis, 130 Ore. 148, 279 Pac. 546, 548 (1929).

[175]Clark v. Devoe, 124 N.Y. 120, 124, 26 N.E. 275 (1891).

[176]Lowrey v. May, 213 Ala. 66, 104 So. 5, 8 (1925).

[177]National Bank of Commerce v. Dunn, 194 Wash. 472, 78 P.2d 535, 542 (1938).

[178]McQuesney v. Heister, 33 Pa. 435 (1859).

promises. A contractual recovery[179] and the contract statute of limitations[180] though apply in actions for their breach.

"A warranty is an incident of a sale."[181] Only between those in privity of contract are actions on them maintainable.[182] Yet their breach has been held to constitute essentially a tort with tort damages,[183] and the tort statute of limitations has been applied,[184] although breach of warranty has been held not to be a tort.[185] Though agreements, they do not appear to be promises.

In an action by the third party on an agreement to assume the payment of a note, the breach-of-contract statute of limitations applies.[186] However, in an action against a contractor, who had assumed the risk, where it was held that the abutting owner could sue as a third-party beneficiary, the action was held to be one for injury to property and that statute of limitations applied. "In order to determine the appropriate statute of limitations, it is necessary to inquire into the facts on which the claim is based."[187]

Conceiving of releases, which extinguish rights instead of creating them,[188] as promises has perpetuated much controversy about the application of the doctrine of consideration,[189] which is augmented by a similar rationale of the mutual releases made when a bilateral contract is rescinded.[190]

Thus, it does make vast practical differences whether the factual transaction or the legal hypothesis of obligation is considered in deciding issues; and also vast practical differences whether or not there is an actual agreement or only an imaginary one and whether the agreement is in

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[179]CLARK, *op. cit. supra* note 155, § 223.

[180]Matter of Boylan, 119 Misc. 545, 197 N.Y. Supp. 710 (County Ct. 1922); Yancey v. Tatlock, 93 Iowa 386, 61 N.W. 997 (1895); Guerin v. Smith, 62 Mich. 369, 28 N.W. 906 (1886); Hyatt v. Mattingly, 68 Ind. 271 (1879); NEW YORK LAW OF LANDLORD AND TENANT § 723 (1937).

[181]Turner v. Edison Storage Battery Co., 248 N.Y. 73, 74, 161 N.E. 423 (1928).

[182]Prinsen v. Russos, 194 Wis. 142, 215 N.W. 905, 906 (1927); Chysky v. Drake Bros. Co., 235 N.Y. 468, 472, 139 N.E. 576 (1923); McCarty v. Williams, 58 Ind. App. 440, 108 N.E. 370, 372 (1915); Mahurin v. Harding, 28 N.H. 128, 59 Am. St. Rep. 401, 403 (1853).

[183]See Thornton, *supra* note 159, at 203.

[184]*Id.* at 201 n. 23.

[185]Rose v. Hurley, 39 Ind. 77, 81 (1872).

[186]Anguish v. Blair, 160 App. Div. 52, 145 N.Y. Supp. 392 (3d Dep't 1914), *aff'd*, 216 N.Y. 746, 111 N.E. 1084 (1916).

[187]Hayunga Holding Corp. v. Rodgers & Hagerty, Inc., 82 N.Y.S.2d 340, 341 (Supp. S.T. 1938).

[188]SALMOND, *op. cit. supra* note 9, at 361 n. (d) c, 366.

[189]FERSON, *op. cit. supra* note 2, at 173.

[190]RICHARDSON, *op. cit. supra* note 26, at 330; ANSON, *op. cit. supra* note 3, at 181; POLLOCK, *op. cit. supra* note 7, at 815; GRISMORE, *op. cit. supra* note 1, at 345.

reality a promise or only non-promissory. Hard practical issues concerning the Statute of Frauds, the statutes of limitation, the measure of recovery, and other matters do force determination of the fundmental character of legal relations and of the actions based thereon.

Yet the practical results are far from conclusive. They do indicate that, only when there is an actual promise and it is treated as what it in fact is instead of being metamorphosed by legal hypothesis into something else, are we perfectly sure that we are dealing with a contract. Along with emphatic doctrinal assertion, goes a bewildering indifference, in many instances, as to whether a transaction is an agreement or not and as to whether an agreement is promissory or non-promissory. The same type of fact situation is given diversity of treatment and, sometimes, facts can be imagined. This practical insouciance in no way, however, impairs the vigor of an inveterate insistence that contractual obligations are essentially different from other, or non-contractual obligations.

Consequently, a glance at the nature of an obligation appears to be unavoidable.

The Nature of an Obligation

Duties

"Obligation in its popular sense is merely a synonym for duty."[191] But, since where there is a duty there must be a correlative right,[192] "looked at from the point of view of the person entitled, an obligation is a right; looked at from the point of view of the person bound, it is a duty."[193] This means that there are always two persons;[194] for "there can be no duty unless there is some one to whom it is due; there can be no right unless there is some one from whom it is claimed."[195] Moreover, the content of any right-duty is always some act; the only way to say what any particular duty is, is to say what is to be done, or forborne, by whom and for whom.[196] Thus there are always the two basic elements, persons and at least one act.[197]

Though obligations can, hence, be looked at as either rights or duties, the popular sense in regarding them as duties is wiser than lawyers' usage

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[191]Salmond, *op. cit. supra* note 9, at 480.
[192]*Id.* at 240; Kocourek, Jural Relations 21 (1927).
[193]Salmond, *op. cit. supra* note 9, at 480.
[194]Of course, there can be more than two persons. The "or more" is taken for granted hereafter.
[195]Salmond, *op. cit. supra* note 9, at 240; Kocourek, Jural Relations 3, 54 (1927).
[196]Kocourek, Jural Relations 4, 58 (1927); Salmond, *op. cit. supra* note 9, at 236, 241; Anson, *op. cit. supra* note 3, at 7; Pollock, *op. cit. supra* note 7, at 4.
[197]Kocourek, Jural Relations 4 (1927).

has been. "While what one person may claim from another is exactly equivalent to what must be performed, yet the results in legal reasoning are not likely to be the same, as one begins with the claimed right or the duty . . . ."[198] The result of beginning with the right is "the inveterate practice of speaking of ideas as though they were physical things,"[199] whereas "the contract obligation, like other right-duty relations, is a concept. It has no physical substance."[200] In addition, the habit of "proceeding from the standpoint of the claim [right] is likely to give an erroneous notion of its nature and to lead to an absolutist view of its scope."[201] Moreover, since "in all legal relations the active element is more important practically," primarily obligations are duties; "the content of the claim [right] is the duty to be performed."[202]

Legal duties exist, because, "when the law recognizes an act as a duty, it commonly enforces the performance of it, or punishes the disregard of it."[203] In short, the law provides sanctions for breach by authorizing some kind of self-help and/or giving judicial remedy.[204]

A judicial sanction operates upon the hypothesis that the person against whom it is directed owed a duty. The duty then breaks down into a primary duty to do or not to do some act and, upon breach of the primary duty, a sanctional duty. For instance, the duty to perform a contract or not to assault another is primary; the duty to pay damages, when the primary duty is broken, is sanctional.[205] Usually this proposition is put in the form that, upon breach, a right of action arises.[206]

Ordinarily, the sanctional duty is to do something different from the act called for in the primary duty, *i.e.*, pay damages.[207] In such instances, it is plain that the sanctional duty is always the one which is enforced. Sometimes, however, the act involved in the primary duty is compelled, as in replevin, ejectment, the enforcement of unconditional obligations to pay money, and specific performance in equity. In such cases, it is said that the primary duty is enforced.[208] Yet the duty, after the breach,

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[198]*Id.* at 14.
[199]Ferson, *op. cit. supra* note 2, at 91 n. 5.
[200]*Id.* at 178.
[201]Kocourek, Jural Relations 14 (1927).
[202]*Ibid.*
[203]Salmond, *op. cit. supra* note 9, at 236.
[204]*Id.* at 130; 3 Bl. Comm. 3; Kocourek, Jural Relations 350 (1927).
[205]Salmond, *op. cit. supra* note 1, at 130, 131, 486 n. (m).
[206]Richardson, *op. cit. supra* note 26, at 359; Anson, *op. cit. supra* note 3, at 446; Pollock, *op. cit. supra* note 7, at 811.
[207]Salmond, *op. cit. supra* note 9, at 130, 131; Kocourek, Jural Relations 350 (1927).
[208]Salmond, *op. cit. supra* note 9, at 130, 131.

is not exactly the same[209] and, moreover, no claimant can enforce anything until his right of action and its corresponding sanctional duty accrue. Hence, the duty enforced is always a sanctional duty.

While all obligations are duties, all duties are not obligations; "obligations are merely one class of duties."[210] In tort, the primary duty is not called an obligation; but "the duty of making pecuniary satisfaction for that species of wrong which is known in English law as a *tort*"[211] is called an obligation. In contract though, both the primary and the sanctional duty are called obligations.[212] Also it has been asserted that "all obligations pertain to the sphere of *proprietary rights*."[213] While this sems a futile refinement, it can be kept in mind.

Contractual and Non-Contractual Obligations

In the inveterate insistence that contractual obligations are different, two points are always stressed: (1) that they are intentionally assumed;[214] and (2) that they are *in personam*.[215]

All duties—those which are and those which are not called obligations—are imposed. "When it is said that one who enters upon an undertaking assumes the legal duties relating to it, what is really meant is that the law imposes the duties on him."[216] Upon the basis of one type of factual situation, the law imposes one kind of duty; upon the basis of another, another kind of duty.[217] But, "while one may have the choice of action, action taken is subject to the law governing it."[218]

The foregoing proposition is undisputed in tort. In contract, however, it is jumbled up by such statements as "obligations are of two kinds: those that result from agreement; and those that result from operation of law;"[219] and "the parties to the agreement must intend to create legal obligations; otherwise there can be no contract."[220] While a tort-feasor must always act voluntarily and, in many cases, acts intentionally, it is

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[209]Restatement, Contracts § 387b (1932); Kocourek, Jural Relations 13, 348-350 (1927).
[210]Salmond, *op. cit. supra* note 9, at 480.
[211]*Id.* at 486.
[212]*Id.* at 130, 480, 486 n. (m); *cf.* Restatement, Contracts § 385a (1932).
[213]Salmond, *op. cit. supra* note 9, at 480.
[214]Richardson, *op. cit. supra* note 26, at 2; Anson, *op. cit. supra* note 3, at 6, 9, 22, 34; Pollock, *op. cit. supra* note 7, at 3; Salmond, *op. cit. supra* note 9, at 366, 486; Ferson, *op. cit. supra* note 2, at 1, 176, 177; Fuller, *op. cit. supra* note 24, at 59, 97; Grismore, *op. cit. supra* note 1, at 3, 7.
[215]See note 214 *supra*.
[216]Tullgren v. Amoskeag Mfg. Co., *supra* note 33.
[217]Ferson, *op. cit. supra* note 2, at 186.
[218]Tullgren v. Amoskeag Mfg. Co., *supra* note 33.
[219]Richardson, *op. cit. supra* note 26, at 2.
[220]*Id.* at 18.

said that his intention never includes assuming legal obligation for his act; that obligation is imposed by "operation of law." In contract, the parties' intention, it is said, must include assuming legal obligation and, if it does not, there may be an agreement but no contract.[221]

Intention in Fact

But "the fact is that, in most cases, when people make offers and acceptances they give no thought whatever to the question as to whether the undertakings shall be obligatory. When agreements are made it is normally assumed that they will be performed without regard to law. The thought of legal sanction does not enter in, since serious agreements are made to be performed not to be broken."[222]

Among the illustrations of the intent-to-incur-legal-obligation theory, the social engagement is always trotted out. Such an agreement, it is asserted, "is not meant to produce, nor does it produce, any new legal duty or right, or any change in existing ones."[223] While this is true, that is so merely because the law as a matter of policy does not enforce such engagements. Other illustrations are promises made in jest, in braggadocio, or as a sham; and, when such a situation is understood by both parties, obviously there is no "intent to contract," since there is no serious intention in fact to do the act. Moreover, where the offeree takes such an offer seriously, liability, if any, certainly is imposed regardless of intention not to assume it. In the case of a promise to do a favor on a condition, as in *Kirksey v. Kirksey,*[224] if both parties know that the act is to be a favor only, there is, at the making, an understanding in fact that performance is not contemplated whatever may happen or whatever change in circumstances may occur;[225] only thereby can anybody tell a stipulation of a condition from a request for a consideration. If the promisee does not know of the mental reservation of the promisor, the case is like those involving jests or braggadocio; and obligation, if any, is imposed against and not because of intention to assume it. As to ordinary promises to make a gift, what negatives enforcement is want of consideration; if the parties were to declare expressly that the promise should be binding in law but failed to put in requisite form, as in an instrument under seal or some statutory substitute therefor, it would be unenforceable still. Nor will any declared intention of the parties that an agreement shall be binding in law suffice to make it so, if it is one which the law will not enforce, as being, for instance, void by public policy or illegal. In the famous case of *Balfour*

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[221]POLLOCK, *op. cit. supra* note 7, at 3; SALMOND, *op. cit. supra* note 9, at 366.
[222]GRISMORE, *op. cit. supra* note 1, at 24; *cf.* HOLMES, *op. cit. supra* note 30, at 302.
[223]POLLOCK, *op. cit. supra* note 7, at 3.
[224]8 Ala. 131 (1845).
[225]GRISMORE, *op. cit. supra* note 1, at 94-96 nn. 57-61.

v. Balfour,[226] more was said about the parties really not intending that they would abide by the agreement whatever change in their circumstances, about lack of consideration, and about the unwisdom of encouraging litigation than concerning want of intention to incur legal obligation. And *Rose & Frank Co. v. Compton & Bros., Ltd.*[227] leaves one wondering whether it was not an intention in fact not to go through with the arrangements in all events, rather than want of intention to incur legal obligation, which did the trick. The parties clearly signaled, when they made the agreement, that they might change their minds, whereas the intention needful for contractual obligation to be imposed in the unequivocal determination of the parties that what they agree upon they will do notwithstanding the fading of anybody's rosy enthusiasm or the parties' later maybe not liking each other so well any more.[228]

The sources of the notion that in contract there must be an intention to assume legal obligation, seem to be (1) a difference frequently, though not always, existing between the nature of the impositive facts of the primary obligation in contract and those of the primary duty in tort, and (2) inadvertence to the element of futurity in all duties.

Consent to the Primary Duty

In contract, according to the juristic hypotheses utilized in reasoning from the fact situations to their legal consequences, the primary obligation is imposed when the agreement is made; previously there is no duty at all.[229] In tort, the sanctional obligation imposed at the commission of the tort[230] is regarded as resulting from a breach of a pre-existing primary duty,[231] which frequently is imposed regardless of voluntary conduct of the obligor and is then the correlative of what is called a right *in rem.*[232] It is this difference which is in mind, when it is said that contractual obligations arise with and non-contractual obligations without consent.

The view, however, neglects the fact that many primary duties not contractual, or not necessarily contractual, are based on consent, as, for instance, those between passenger and carrier, husband and wife, or innkeeper and guest.

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[226][1919] 2 K.B. 571, 574, 575, 577, 579.
[227][1923] 2 K.B. 261, [1925] A.C. 445.
[228]See note 135 *supra;* HOLMES, *op. cit. supra* note 30, at 299-301.
[229]SALMOND, *op. cit. supra* note 9, at 363, 486.
[230]*Id.* at 378, 486, 490; ANSON, *op. cit. supra* note 3, at 6 n 4.
[231]SALMOND, *op. cit. supra* note 9, at 130, 378, 486, 490.
[232]KOCOUREK, JURAL RELATIONS c. 13 (1927); SALMOND, *op. cit. supra* note 9, at 241, 261, 490.

The Element of Futurity

The promise of an enforceable promise, it is frequently said, has "a right in the future conduct of the promisor,"[233] "a right . . . to another man's conduct in the future."[234] These statements leave an impression that such is not the case when a duty is based on a non-promissory agreement or on facts not involving consent. However, the content of every duty is a future act. The only way to say what a duty is is to say what is to be done or forborne.[235] If an act has already occurred, there is no duty not to do it; there may be a duty not to do it again; but, as to what has already occurred, the duty, if any, is (usually) to pay damages for it. "The law functions only through human conduct, and, accordingly, it looks solely to *future* acts."[236] There is no difference in this respect between a duty imposed without consent, a duty imposed on the basis of a non-promissory agreement, and a duty imposed on the basis of a promise. All relate to conduct of the persons owing the duties in the future.

Differences

Differences, however appear as follows: As regards a duty imposed without consent, the obligor has no choice as to the primary duty; he has a choice only as to whether or not he will fulfill it. As regards a duty imposed on the basis of any agreement, the obligor has a choice as to whether or not, and in what measure, he will supply the impositive facts of the primary duty, and as well a choice to fulfil it or not. As regards a duty imposed on the basis of a promise, the obligor has a choice as to whether or not, and in what measure, he will supply the impositive facts of the primary obligation, and as well a choice to fulfill it or not; and he has more. He has a choice in defining what future act shall be the content of the obligation which the law imposes.[237]

Thus there is a peculiar relation between a promise and the obligation which it engenders. The exercise of this capacity to choose the future act looks very much like the operation of an intention to incur legal obligation. Yet, though the parties to a promise have the greatest amplitude in regulating the factual basis of liability, it is the intention in fact to do or not to do the act defined which counts; the law acts upon what the parties do whether they want it to or not.[238] Ordinarily, a person who makes and breaks a contract has no more purpose of incurring legal liability than has a person who commits a tort.

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[233]Richardson, *op. cit. supra* note 26, at 1.
[234]Pollock, *op. cit. supra* note 7, at 1.
[235]See note 196 *supra*.
[236]Kocourek, Jural Relations 3 (1927); *cf.* Kocourek, *supra* at 5.
[237]See notes 134, 135, 136 *supra*.
[238]Kenney v. Wong Len, 81 N.H. 42, 128 Atl. 343, 349 (1925).

The notion of "intent to contract" stems from the peculiar relation between a promise and its obligation. Insistence that this feature is distinctive of contract tacitly assumes that a contract necessarily is a promise.

The *In Personam* Character of the Obligation

A duty owed by a determinate person is said to be *in personam.*[239] A duty owed by "persons in general,"[240] "a vague multitude of persons,"[241] is said to be *in rem.*[242] In both classes, the holder of the right to performance of the duty is said to be determinate.[243] However, all sanctional obligations are *in personam;* the parties on both ends of the relation are determinate in these, whether tort or contract. Consequently, the assertion of distinctiveness in contractual obligation, because it is *in personam,* can relate only to the primary obligation.

The distinction does not seem to amount to much, when it is remembered that no holder of any right *in rem* can do anything about it until the duty is broken and his right of action and its corresponding sanctional obligation *in personam* accrues.[244] And the same thing is true of the holder of a primary right *in personam.*

For this reason, it has been said that "it is only by juristic hypothesis that unpolarized relations [rights-duties *in rem*] can be denominated legal relations at all."[245] For the same reason, the same thing can be said of duties *in personam,* even of primary contractual obligations. However, it is as useless to argue against the existence of primary duties, whether *in rem* or *in personam,* as it is to flout the romantic doctrine that there is a man in the moon. All that is necessary is to try not to be fooled by either.

Here it is sufficient to note that the primary duty in tort is sometimes *in personam* too, for instance, as in an action against an innkeeper for refusing to receive a guest.[246] Moreover, duties *in rem* are imposed on the basis of agreement, as in grant or gift, and on the basis of facts including no consent, as in title by descent or by adverse possession. Duties *in personam* are based on facts involving no consent, as those between owner

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[239]SALMOND, *op. cit. supra* note 9, at 258; HOLLAND, *op. cit. supra* note 47, at 145; FERSON, *op. cit. supra* note 2, at 177; HOHFELD, *op. cit. supra* note 13, at 69; *cf.* KOCOUREK, JURAL RELATIONS c. 13 (1927)..

[240]SALMOND, *op. cit. supra* note 9, at 241.

[241]*Id.* at 262.

[242]See note 239 *supra.*

[243]SALMOND, *op. cit. supra* note 9, at 240, 241, 258; FERSON, *op. cit. supra* note 2, at 176; KOCOUREK, JURAL RELATIONS c. 13 (1927).

[244]The evolution of declaratory judgments does not change this. These remedies announce the imposition of some new rights-duties. There is no right without a remedy, so they say.

[245]KOCOUREK, JURAL RELATIONS 344 (1927).

[246]SALMOND, *op. cit. supra* note 9, at 490.

and finder,[247] and on non-promissory agreements, as those between husband and wife, not to mention bailor and bailee, passenger and carrier, and the like, as well as on promises. Promises too give rise to duties *in rem,* as witnesses an action for malicious interference with contract. Proprietary rights are both *in rem* and *in personam;* likewise, personal rights, since the right-duty in a case of assault is *in rem* as much as in the ownership of property.[248] It has been pointed out that duties *in rem* are usually, always it is asserted, negative, while obligations are usually affirmative.[249] However, the import of the modern decisions is that the primary duty involved in tort negligence, frequently *in rem,* is affirmative.[250] And the primary obligation in contract may be negative, namely, to forbear rather than to do some act.

The *in personam* rationale does not in itself show that a primary contractual obligation is different from other primary duties. Suppose that John gives Bill his fountain pen. "John's obligation after the gift has been made to leave Bill in possession of the pen is the same as that of everyone else, including Bob, Tom, and Harry."[251] If, however, John contracts to sell his pen to Bill, his obligation is not the same as that of everyone else. Should John loan his pen to Bill, Bill's duty to take care of it would not be the same as that of everyone else; nor would it be, if John should lose the pen and Bill find it. If Bob, Tom, or Harry should take John's pen from Bill while he was enjoying a loan of it, the duty violated would be *in rem.* If John were to sell Bill a business and agree not to compete with him, John's duties, with respect to the conveyances, would be the same as everyone else's; but, with respect to the negative covenant, not the same as everyone else's; yet all arise from agreement. However, if John were to assault Bill, the duty broken would be the same as that of everyone else.

In regard to these various situations, some matters are clear. For instance, before anybody can do anything about any duty, there must be a breach and the accrual of a right of action and its corresponding sanctional obligation *in personam.* In the case of assault, the complainant need not prove the impositive facts of the primary duty; in the other cases, he must. A good many issues can arise with respect to the Statute of Frauds, the statutes of limitation, and the measures of recovery; but the determination of these would not turn on whether or not the duty involved is *in personam* or *in rem.* Most likely, the nature of the impositive facts would be more

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[247]Goddard, Outlines of the Law of Bailments and Carriers 41 (2d ed. 1928); Story on Bailments 48, 92 (4th ed. 1846).

[248]Hohfeld, *op. cit. supra* note 13, at 85; Salmond, *op. cit. supra* note 9, at 259; Kocourek, Jural Relations 202 (1927).

[249]Salmond, *op. cit. supra* note 9, at 260.

[250]See Snyder, *Liability for Negative Conduct,* 35 Va. L. Rev. 446 (1949).

[251]Fuller, *op. cit. supra* note 24, at 96.

important. Yet the impositive facts might involve an agreement, between or not between the parties to the action, and again they might not. Finally, discussion will simmer down to the contention that there is a difference between the duties *in rem* arising from the executed agreement of grant and the duties *in personam* arising from the executory agreement of promise. In this last set-up, it is true that a duty *in rem* can be broken by anybody, while a duty *in personam* can be broken only by a determinate person. But that does not prove that a duty *in personam* is contractual.

The odd feature of the *in personam* characterization of contractual obligation is that it is made upon the assumption that a contract is a promise.[252] This association seems to indicate that there is something especially potent in the *in-personam*-ness of an obligation imposed on the basis of a promise. And there is: in a promise, the parties themselves define the future act which is the content of the duty.

What It Adds Up to

To the predilections in the definitons; to the analysis of the nature of a promise; to the weight of results in the application of statutes of limitation, the Statute of Frauds, and measures of recovery; to the tacit assumptions in "intent to contract" and in the *in personam* characterization of contractual obligation; to the conflicts and confusion arising when transactions involve no actual promises but fictional promises are presumed and when the conception of an actual agreement shifts between its being promissory and non-promissory—, other data, as follows, can be added: "The theory of the English law of contract is contained in the doctrine of consideration," which is "a requirement for making *promises* binding."[253] When the doctrine that a seal merely "imported" consideration appeared, the courts wobbled but did not fall for its applicability to the non-promissory agreement of release or for that transaction's being a contract.[254] And, in the inveterate practice of classifying obligations as contractual or not, instead of going at the job the other way around, invariably contracts are taken to be promises.[255]

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[252]Ferson, *op. cit. supra* note 2, at 176; Fuller, *op. cit. supra* note 24, at 96; Salmond, *op. cit. supra* note 9, at 366; Anson, *op. cit. supra* note 3, at 6; Pollock, *op. cit. supra* note 7, at 4, 186.

[253]See notes 5, 6, 7 *supra*.

[254]Stiebel v. Grosberg, *supra* note 9.

[255]Sealy on Torts 1 (1939); Burdick on Torts 4 (4th ed. 1926); 1 Cooley on Torts 3, 171, 173 (4th ed. 1932); Jenks, A Short History of English Law 132 (1922); Salmond, *op. cit. supra* note 9, at 487; Restatement, Torts § 525 (1938); *cf.* Kelly v. Metropolitan Ry., [1895] 1 Q.B. 944; Rich v. N.Y. Cent. & H. R.R., 87 N.Y. 382 (1882).

All these factors indicate that a transaction enforceable by action for affirmative relief, which is in fact both an agreement and a promise, is a contract; and that the promissory agreement is the contract, rather than the hypothesis of obligation utilized in reasoning therefrom to the legal consequences. So much is plain.

It is plain too that mere enforceability by action for affirmative relief, namely, that an agreement is binding in law, that it gives rise to legal rights-duties, which ineluctably embrace another man's, or other men's, future conduct, does not in itself make that agreement a contract. The purport of modern scholarship is that such non-promissory agreements are not contracts.

A good many things though are somewhat mixed up. In many typical transactions where there are actual agreements, we are not sure whether promises are involved or not, and, if so, whether the promises are "implied in fact" or only "implied in law."[256] In various estoppel situations, both promissory and in fact, there are no actual agreements, and yet there seems to be some compulsion to cram the cases into the contractual mold.[257] Negatively enforceable releases, mutual releases, and accord-and-satisfactions intertwine with covenants never to sue.[258]

Rather than "to jumble all types . . . together in a vast hodge-podge of unrelated material,"[259] it might be better to separate the usual subject matter of contracts into (1) the genuine agreements and the non-agreements;[260] (2) separate the genuine agreements into the promises, the non-promises, and the question-marks;[261] (3) separate the promises into those which produce and those which both produce and discharge rights-duties; and (4) separate the non-promises into those which produce and those which only discharge rights-duties. These break-downs will show that offer and acceptance, reality of consent, operation, and discharge are not precisely the same in the various types of genuine agreements; disclose

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[256]See note 144 *supra.*

[257]See notes 101-108 *supra.*

[258]Cairo, T. & S. R.R. v. United States, 267 U.S. 350 (1925); Levine v. Blumenthal, 117 N.J.L. 23, 186 Atl. 457 (1936); Luddington v. Bell, 77 N.Y. 138 (1879); Robinson v. Godfrey, 2 Mich. 408 (1852); Ford v. Beech, 11 Q.B. 852, 116 Eng. Rep. 693 (1848); RESTATEMENT, CONTRACTS § § 402e, 450a (1932); WILLISTON, CASES ON CONTRACTS 183, 186 (1949); PATTERSON & GOBLE, *op. cit. supra* note 22, at 1010; SHEPPHERD, *op. cit. supra* note 23, at 318; FULLER, *op. cit. supra* note 24, at 482; GRISMORE, *op. cit. supra* note 1, at 345, 360; ANSON, *op. cit. supra* note 3, at 177; POLLOCK, *op. cit. supra* note 7, at 210, 813; FERSON, *op. cit. supra* note 2, at 155; see notes 8-12 *supra.*

[259]*Cf.* APPLEMAN, *op. cit. supra* note 117, at 2.

[260]See notes 101-108 *supra.*

[261]See notes 144, 154-190 *supra.*

the different relation which the doctrine of consideration has to promises from that which it has to deeds and that, or the non-relation, which it has to releases, mutual releases, and accord-and-satisfactions; open the way for fuller study of the factual and legal nature of the question-mark transactions; move the non-agreements over where their kinship with quasi-contracts can be observed; and reveal the practical problems arising in applying statutes of limitation, the Statute of Frauds, and measures of recovery to the diverse factual situations.

It is no longer necessary to call a transaction a contract in order to get a remedy. The days of glorifying a situation by invoking the magic word are receding. We are not in these times striding with seven-league boots from status to contract and this affords opportunity to inquire less rapturously into what a contract in reality is.

LEGAL PRINCIPLES GOVERNING COUNTY BOARDS OF SUPERVISORS*

*Means Johnston***

The fundamental principles of law, and practice and procedure before county boards of supervisors is a profession within itself; and on account of the legislature creating new laws and new functions, and amending old statutes, and the decisions of our Supreme Court on county affairs from time to time, it is very difficult to keep up with such statutes and decisions. It requires a great deal of work to properly advise the board of supervisors of a county, who possess such large duties and responsibilities of office. It is for that reason that I have devoted so much time in this address to the fundamental principles of law governing counties and boards of supervisors.

Jurisdiction and Duties of County Boards

The county, as a unit of government, is older in point of time than either the state or the town; and government by means of counties has existed in England since an early date, and in all of the United States, with a few exceptions, since their settlement. Counties are created by the soverign powers of the state, without the consent or participation of the inhabitants thereof, and have existed in this state since its creation. The governing authorities of counties in this state prior to the Constitution of 1869 were known as the board of police, but the Constitution of 1869 provided for a board of supervisors for each county, with full jurisdiction over roads, ferries, and bridges. The Constitution of 1890 provided for like jurisdiction and also required that each county shall be divided into five districts, and that a resident freeholder of each district shall be selected, in a manner prescribed by law, and the five so chosen shall constitute the board of supervisors of the county; and that the board of supervisors shall have full jurisdiction over county roads, bridges, and ferries, to be exercised in accordance with such regulations as the legislature may prescribe and perform such other duties as may be required by law; and further provided that the clerk of the chancery court shall be the clerk of the board of supervisors. Under the provisions of the constitution the board of supervisors has such other jurisdiction in accordance with *such regulations as the legislature may provide;* and the importance of this provision will more fully appear hereafter. It is also provided, by Section 2890 of the Code of 1942, that the board of supervisors shall have within their respective counties, full jurisdiction over roads, ferries, and bridges,

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except as otherwise provided by Section 170 of the constitution and all other matters of county police. They shall have full jurisdiction over the subject of paupers; and full power to levy such taxes as may be necessary to meet the demands of their respective counties, upon such persons and property as are subject to state taxes for the time being, not exceeding the limits that may be prescribed by law; and shall cause to be erected and kept in good repair a good and convenient court house and jail; and they shall have and exercise such further powers as are or shall be conferred upon them by law.

The jurisdiction of the board of supervisors since the adoption of the Constitution of 1890 has constantly increased. The Legislature of Mississippi has from time to time conferred additional powers, duties, and responsibilities, and at this time, the duties, and responsibilities are vast, and materially affect all citizens. The county boards are closer to the people than any other division of government, except possibly municipal government, and is commonly known as local self government; and the members of the board are directly responsible to the people of the county in performance of their duties.

I desire to call your attention to the most important duties and responsibilities of the board, *as authorized by statute.* (1) The board is required to erect a court house and jail, and provide a court room for the courts, and offices for the county officers, and to furnish the same. (2) They exercise jurisdiction over county roads and bridges. (3) They prepare annually the county budget. (4) They assess and levy taxes for the operation of the county government, school districts, road districts, and drainage districts. (5) They establish county depositories to safeguard the funds of the county, and districts of the county. (6) They are required to maintain and support and bury the paupers of the county. (7) They contract for public works, public roads and materials and supplies of the county. (8) They maintain the county jail, the county farm, and supervise the prisoners of the county jail and county farm. (9) They have jurisdiction over township funds, and the sixteenth sections of the county. (10) They appropriate all of the county funds of the county for the purposes authorized by law. (11) They issue all of the bonds of the county, school districts, road districts, and drainage districts, and levy all of the taxes to pay the principal and interest on such bonds. (12) Among miscellaneous powers, they may also establish and maintain airports, and departments of agriculture, employ agents, clerical help, and pay all necessary expenses; may establish a department of home economics, employ county agents, clerical help and pay the expenses thereof; also a department of public welfare and pay the expenses thereof; also may incur expenses of the courts, and the court house and jail. They may donate for

certain charitable purposes; pay the expenses of conducting elections; and must pay certain salaries and fees of county officers. The board may also establish, maintain and support a county health department, and provide for the indigent sick. It may purchase real estate for county purposes, and establish, maintain and support county hospitals; may exercise and perform many other duties as provided by law, and appropriate the funds of the county to any object authorized by law. They perform in many instances ministerial duties; and if they fail to perform such duties, and the county suffers financial loss, they are liable on their official bond. They are subject to civil and criminal liability under certain conditions as provided by statute.

It will be observed from the foregoing that the business of a county is very important to the people of the county. A county is a vast quasi-corporation. The board of supervisors is in fact its board of directors. It is therefore important that the members should be good business men. They should always have in mind the best interests of the citizens and taxpayers of the county. They should have great respect for the law regulating their duties and responsibilities.

While the duties, powers and responsibilities of the board are great, they must always be exercised in the manner authorized by statute. If it desires to erect public works, or contract or incur public indebtedness, or appropriate money for public use, there must be statutory authority for such act; and if there is no statute, the board does not have such authority; and if there is doubt, then such doubt should be resolved in favor of the taxpayers.

It will be observed from the foregoing that the powers and authority of a board of supervisors are limited strictly to those conferred by statute and that boards must conform to the statutory method in performing their constitutional duties. Persons dealing with a board of supervisors must take notice of its powers, because they cannot acquire rights beyond authorized powers.

This doctrine is supported by numerous decisions, among which are the following cases.

In *Jefferson County v. Crafton,*[1] the court held that counties are involuntary, political or civil divisions of the state designed to aid in the administration of government, as state auxiliaries or functionaries, possessing no other powers than those delegated, ranking low in the scale of corporate existence, and well distinguishable from municipal corporations

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[1]74 Miss. 435, 443, 21 So. 247, 249 (1897).

proper, which are invested with more extensive powers. As a rule, they cannot acquire real estate, unless for public utility, and cannot dispose of the same after it has been acquired and devoted to public services, without legislative authority. "They have no life, no attribute, no power, no rights, no obligations, but such as has been conferred or imposed upon them."

And in *Brabham v. Board of Supervisors of Hinds County,*[2] the court held that counties are political divisions of the state, created for convenience. They are not corporations with the right to sue and be sued as an incident to their being, but are quasi-corporations, invested by statutes with certain powers and subject to certain liabilities, and can neither sue nor be sued, except as authorized by statute.

In *Redditt v. Wall,*[3] the court said that "All the duty which a county owes to any member of the public is prescribed by statute, and all the liability which can be imposed upon it must be found in the same authority."

Again, in *Stephens v. Beaver Dam Drainage District,*[4] the court said:

> . . . in the absence of a valid statute imposing liability therefor, a public corporation created *in invitum* for the purpose of discharging a public function is not liable for the negligence of its officers, agents, or employees.

And in *Green v. Board of Supervisors of Adams County,*[5] the court said that:

> It is the settled rule in this state that boards of supervisors exercise only limited and special jurisdiction, and that in the exercise of their limited statutory authority all the necessary jurisdictional facts must appear on the record of their proceeding. And an order of the board of supervisors authorizing the issuance of bonds which does not affirmatively show the facts necessary to give the board jurisdiction is void.

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[2] 54 Miss. 363 (1877).

[3] 55 So. 45, 46 (Miss. 1911). *Accord,* City of Grenada v. Grenada County, 115 Miss. 831, 76 So. 682 (1917).

[4] 123 Miss. 884, 900, 86 So. 641 (1920). *Accord,* Universal Motor Co. v. Newton County, 158 Miss. 837, 131 So. 827 (1930); DeSoto County v. Stranahan, Harris & Oatis, 159 Miss. 23, 131 So. 640 (1930); Tallahatchie Drainage Dist. No. 1 v. Yocona-Tallahatchie Drainage Dist. No. 1, 148 Miss. 182, 114 So. 264 (1927); Bd. of Sup'rs. of Greene County v. Snellgrove, 103 Miss. 898, 60 So. 1023 (1913); Adams v. First National Bank, 103 Miss. 744, 60 So. 770 (1913).

[5] 172 Miss. 573, 579, 161 So. 139, 140 (1935).

Contracts for Public Works, Roads, Materials and Supplies

It is common practice for attorneys to represent contractors bidding for public works, public roads and for materials and supplies. In order to represent properly a contractor, it is certainly necessary for the attorney to familiarize himself with the various statutes applicable to such contracts. In that connection I call to your attention the following statutory requirements.

Code Section 2917 provides that all contracts by boards of supervisors for any public work, where the amount of the contract shall exceed $100, shall be made upon at least three weeks public notice by advertisement, and said notice shall distinctly state the thing to be done, and invite sealed proposals, to be filed with the clerk, to do the work; and further provides that in all cases, before the notice shall be published, the plans and specifications for the work shall be filed with the clerk and there remain; and the board shall award the contract to the lowest bidder and enter into bond with sufficient sureties in a sum not less than the contract price, conditioned for the prompt, proper and efficient performance of the contract. Section 2918 prescribes the character of the notice to be published.

Section 2919 prescribes how the payment for the work shall be made. All contracts must be made in open session, except in cases of emergency as therein provided; and it is the duty of the board to accept the lowest responsible bid for the erection and construction of all public buildings, bridges, and public works, or for the execution of any other contract. Said section further provides that any bidder will be deemed responsible who will enter into bond in double the amount of the bid made by such bidder for the prompt, proper and efficient performance of this contract. *This statute provides that all contracts made in violation of any of the provisions of law shall be void.*

Section 9027 provides that all contracts for supplies for public works, public buildings and public construction shall be let upon competitive bids for periods of not more than twelve months in advance; and that no individual of any such board shall in any case purchase any such supplies, nor any such board ratify any such purchases made by any member thereof or pay for the same out of public funds, except for emergency purposes not exceeding $100.

Section 8335 further states that contracts for roads and bridges, if the amount of the contract price exceeds $250, shall be made only upon competitive bids after due advertisement therefor, as provided by law, but in cases of emergency such contracts may be made in amounts not to exceed $500 without advertisement; and Section 8336 provides that before any

contract for any road or bridge shall be let, plans and specifications for the construction shall be filed with the clerk of the board for the inspection of prospective bidders.

It will be observed, therefore, that if an attorney represents a contractor bidding for public works, public roads, materials and supplies, the first thing that he should do is to see that the plans and specifications for such public works or supplies is on file with the clerk of the board; and second, that notice to contractors has been published in a lawful newspaper for three consecutive weeks and twenty-one days prior to the meeting of the board considering such bids; and third, that proof of publication of such notice is on file with the clerk of the board at the time said contract is awarded; and fourth, that any such bid shall be in accordance with such plans and specifications and notice. Otherwise, any such contract is void.

Parties contracting with counties are charged with notice of statutory requirements, and must see that the contract is legal.[6] In the absence of a valid express contract, the county is not liable under an implied contract for articles purchased for road machinery.[7] And the board cannot bind the county for a contract not let on advertisement to the lowest bidder.[8]

Proof of publication of notice to bidders is jurisdictional and must be filed with the clerk of the board at the time the contract is made, or such contract is invalid, notwithstanding publication in fact. In one case[9] the court said:

> It is to be regretted that parties dealing with these boards will sometimes, on account of procedural oversights, such as this, lose their demands for property furnished to and used by the counties; but we have no legitimate power, in order to prevent hard results in an occasional case, to set aside settled rules based upon sound legal principles.

Advertisements for bids must be published for three consecutive weeks, or the contract is void.[10] And counties, in making expenditures and awarding contracts for public works, must observe statutory requirements as to sealed bids and specifications.[11] The board can only contract

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[6]Jackson Equip. & Serv. Co. v. Dunlop, 172 Miss. 752, 160 So. 734 (1935); Merchants Bank & Trust Co. v. Scott County, 164 Miss. 91, 145 So. 908 (1933).

[7]Attala County v. Miss. Tractor & Equip. Co., 162 Miss. 564, 139 So. 628 (1932).

[8]Corinth to Gulf Highway v. Carothers & Co., 129 Miss. 645, 92 So. 696 (1922).

[9]Austin-Western Road Mach. Co. v. Webster County, 170 Miss. 601, 603, 154 So. 723 (1934).

[10]Merchants Bank & Trust Co. v. Scott County, 165 Miss. 91, 145 So. 908 (1933).

[11]Bd. of Sup'rs. of Leflore County v. Canon, 81 Miss. 334, 33 So. 81 (1902).

as provided by law, and such contract must be evidenced by an order entered on its minutes.[12]

For example, in *Martin v. Newell*[13] the court held that a county board of supervisors can contract only by an order on its minutes; an order on the minutes of the county board of supervisors is essential to the validity of a contract; and a person dealing with county boards of supervisors must see to it that his contract is legal.

If the bid of a contractor is accepted, then it is the duty of the contractor's attorney to see that an order is prepared which shall recite all of the jurisdictional facts necessary to make a legal contract. In other words, the order of the board accepting the bid of the contractor should adjudicate that the plans and specifications have been adopted by the board by an order entered upon its minutes; that said order has directed the publication of such notice to bidders of its intention to consider bids for such public works, or roads or supplies at its next meeting; that such notice has been published for three consecutive weeks, and twenty-one days prior to the meeting of the board considering such bids; that proof of publication of such notice was on file with the clerk of the board at the time said contract was awarded; that such bid is in accordance with such plans and specifications and notice to bidder; and that said bid is the lowest and best bid submitted. After reciting such jurisdictional facts, the order of the board should award the contract to the contractor; and provide that such contract shall be executed by the president of the board on behalf of the county with the contractor, upon the contractor entering into the amount of the bond as prescribed by law and the order of the board. Then the attorney representing such contractor should see that said order awarding the contract is entered upon the minutes of the board, and that the bond is executed, approved and filed with the clerk. If these precautionary measures are taken, the contractor will have a valid contract which may be enforced by law.

Non-Liability of County for Negligence or Unauthorized Acts

There are many cases where clients consult attorneys, with reference to accidents and injuries sustained on account of the negligence of the county officers and agents; or for damages sustained because of the failure of the board of supervisors to perform a public duty; or for damages sustained on account of unauthorized acts of the board. It often happens that

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[12]Corinth to Gulf Highway v. Carothers & Co., 129 Miss. 645, 92 So. 696 (1922); Smith County v. Mangum, 127 Miss. 192, 89 So. 913 (1921); No. Drainage Dist. v. Boliva County, 111 Miss. 250, 71 So. 380 (1916); Marion County v. Woulard, 77 Miss. 343, 27 So. 619 (1899); Bridges v. Clay County, 58 Miss. 817 (1881).

[13]198 Miss. 809, 23 So.2d 796 (1945).

county trucks collide with automobiles and trucks owned by private persons, and as a result, private persons sustain personal injuries and damages to their automobile or truck. When an attorney is called upon for advice with reference to such matters, it is necessary for him to consult the statutes of the state. If there is no statute authorizing such suits, then the county is not liable. This principle has been adjudicated by many decisions of the Supreme Court of Mississippi.

In *Pidgeon-Thomas Iron Company v. Leflore County,*[14] for example, the court said:

> Counties are political subdivisions of the state, created for the purpose of discharging public duties, and it is settled by numerous decisions of this court that no suit can be maintained against a county for negligence of its officers unless such liability is created by some statute, expressly or by necessary implication.

And in the case of *Lee County v. Payne,*[15] the court said:

> It is argued that counties and municipalities are upon the same plane, and should be held alike liable for a break of contract. The courts have universally made a distinction between counties and other municipal corporations, such as cities, towns, and villages. The principal ground upon which counties are not held liable for damages in actions for their neglect of public duty is that they are involuntary political divisions of the state, created for governmental purposes, and are organized without regard to the consent or dissent of the inhabitants. The theory upon which municipal corporations proper are held liable in such cases is that they are voluntary associations created and organized at the solicitation of, and with the free consent of, the inhabitants, under the laws of the state, and that the benefits accruing to the people by such incorporation compensate them for the liability. Another reason is that since the county is but a political subdivision of the state, a suit against the county is, in effect, a suit against the state, and that therefore an action will not like without the consent of the legislature. But some courts allow a recovery where a constitutional right is invaded, as where it can be construed to be a taking of private property without compensation.

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[14]135 Miss. 155, 166, 99 So. 677, 679 (1924). *Accord,* Bd. of Sup'rs. of Lee County v. Payne, 175 Miss. 12, 166 So. 332 (1936); Simpson v. Kelly, 175 Miss. 596, 166 So. 532 (1936); Redditt v. Wall, 55 So. 45 (Miss. 1911); Rainey v. Hinds County, 79 Miss. 238, 30 So. 636 (1901); State v. Vaughn, 77 Miss. 681, 27 So. 999 (1900); Brabham v. Bd. of Sup'rs. of Hinds County, 54 Miss. 363 (1877).

[15]175 Miss. 12, 23, 166 So. 332, 335 (1936). *Accord,* Harrison County v. Marione, 110 Miss. 592, 70 So. 702 (1916).

Claims and Demands Against the County

Code Section 2932 provides that a person having a just claim against any county shall first file the same with the clerk of the board of supervisors, properly dated and itemized, and accompanied by any evidence of performance or delivery required by law to be filed therewith, for presentation to the board for allowance; and further provides, that if the board shall reject said claim in whole or in part, or refuse, when requested at a proper time, to pass finally on it, the claimant may appeal to the circuit court, or may bring suit against the county on his claim.

Section 2933 provides that all claims filed for allowance, based upon a sale or sales of personal property, shall be itemized to show in detail the kind, quantity and price of the articles sold, and shall be accompanied either by receipt by a public officer, agent, or employee authorized to accept delivery, or a bill of lading or shipping receipt issued by a common carrier making delivery, or an affidavit of the seller showing how, where, when and to whom delivery was made.

Section 2934 provides that the clerk of the board shall keep a docket of the claims, in which he shall enter all demands, claims and accounts against the county in the order in which they are filed, and all claims shall be numbered to correspond with the warrants to be issued therefor, if allowed. Upon being notified of any judgment being rendered against the county, the clerk shall docket the same as a claim for allowance and payment as provided by law.

Section 2935 requires that at each regular session of the board, the claim docketed shall be called and all claims then on file not previously rejected or allowed shall be passed upon in the order in which they are entered upon the docket; all claims found to be illegal shall be rejected or disallowed; and all other claims shall be audited, and all of these found proper shall be allowed in the order in which they appear on the docket. This is done whether or not there shall then be sufficient money in the general funds on which warrants shall be drawn for their payment.

Every claim against the county must first be presented to the board of supervisors for allowance before suit is authorized, and the declaration must state that this has been done. A plea of the general issue puts the burden of proof of such facts on the plaintiff.[16] But in a suit against the

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[16]Martin v. Newell, 198 Miss. 809, 23 So.2d 796 (1945); Covington County v. Morris, 122 Miss. 495, 84 So. 462 (1920); Marion County v. Woulard, 77 Miss. 343, 27 So. 619 (1900).

county, it is unnecessary to show an order on the minutes of the board of supervisors rejecting the claim. The disallowance may rest in parol.[17]

Liability of the Members of the Board of Supervisors

Liability of members of the board for their official acts is fixed by statute. Code Section 2942 provides that it shall be unlawful to allow a greater sum for any account, claim and demand, than the amount due for services rendered, or for salaries or fees of officers or materials furnished; or to issue a warrant for more than the actual amount due. Section 2944 states that if a board of supervisors shall appropriate any money to an object not authorized by law, the members of the board who did not vote against the appropriation shall be liable personally for such sums of money, to be recovered by suit in the name of the county, or in the name of any person who is a taxpayer who will sue for the use of the county, and who shall be liable for costs in such case.

There have been more suits filed against members of boards of supervisors under this latter section than any other section of the code. In most cases these suits have been filed by the State Tax Collector, and the State Auditor. The books of the county are audited annually by the auditing department of the state; and the auditors usually are very strict in passing upon and checking the various appropriations made by the board. The State Tax Collector also has in many cases checked the books of the county for the purpose of determining whether or not the board of supervisors has appropriated money to an object not authorized by law. It is therefore important that the legal adviser of the board check each and all of the claims and demands of the county before they are presented to the board for allowance and payment. And it is necessary that there shall be statutory authority for the allowance of each and all of such claims, or otherwise it will be the duty of the attorney representing the board to advise it to reject such claims that are not authorized by law. This is one of the most important duties that an attorney for a board of supervisors is called upon to perform, and involves great responsibility. If the board should allow a claim not authorized by law, then the members of the board are liable personally on their official bonds.

Non-Liability of Counties on Implied Contracts, or on Quantum Meruit Basis, or for Breach of Contracts

The matter of the liability of a county for a breach of contract presents a very serious question. There is no statute authorizing such liability.

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[17]Miss. Code § 2932 (1942); Simpson County v. Kelly, 175 Miss. 596, 166 So. 532 (1936); Clay County v. Chickasaw County, 76 Miss. 418, 24 So. 975 (1899); Brookhaven v. Lawrence County, 55 Miss. 187 (1877).

If a contract is made, and all of the jurisdictional proceedings authorizing any such contract are complied with, it seems that if the county breaches the contract authorized by law, the county should be liable.[18]

In *Amite County v. Mills*,[19] the county was sued to recover the amount due under a road contract. The county answered and contended that the contract was void, because the engineer failed to make an estimate of the cost of construction for each mile, and failed to report such survey and estimate to the road commissioners as required by law, and that such requirements were mandatory. The plaintiff amended his bill and sought to recover from the county on a quantum meruit basis for the work done; whereupon, a decree was rendered against the county. Upon appeal the court said:

> The statute being mandatory, the failure by the engineer to have the estimate of the cost made and reported to and approved by the road commissioners and the board of supervisors, and spread upon the minutes, as required by the statute, renders the contract void.
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> It is next contended that, if the contract is void because of such failure to make said estimate and have it approved in the manner required by statute, nevertheless the appellee . . . should be allowed to recover for the work actually done on a quantum meruit basis; that the county having acquiesced in the work being done, and having made partial payments as the work progressed, makes it an implied contract, and the county having used the road so constructed, and having recognized the contract through its board of supervisors by making such payments, cannot now escape liability because of the failure to file the estimates and have them entered upon the records.
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> In our opinion this contention cannot be maintained, and this case is controlled on that branch of the litigation by *Smith County v. Mangum* . . . and the authorities referred to in that case. This being true, the appellee had no basis for recovery, and the judgment of the court below must be reversed, and judgment rendered here for the appellant.

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[18]In Tallahatchie Drainage Dist. No. 1 v. Yocona-Tallahatchie Dist. No. 1, 148 Miss. 182, 114 So. 264 (1927), the court held that the board of supervisors has no implied powers, that all its acts must be expressly authorized by law, and furthermore, that it can only act through its minutes spread upon the records of its office.

[19]138 Miss. 222, 235, 102 So. 465, 466 (1925).

In *Smith County v. Mangum*[20] the board had adopted plans and specifications for building a bridge across a creek on a public road of the county. It made publication as required by law for the letting of the contract, and at the proper time. Plaintiff was the lowest and best bidder at the December Term and was awarded the contract. The order awarding such contract was not entered upon the minutes of said December Term. In the meantime, plaintiff began building the bridge and this work had progressed to a very great extent when, at the January meeting of the board, an order was spread upon the minutes rejecting plaintiff's bid. One of the members of the board, in the latter part of January, notified the agent of the plaintiff that his bid had been rejected. This agent thereupon took the matter up with three members of the board and was assured by them that it would be all right for him to proceed with the erection of the bridge. After completion of the bridge, it was inspected by the board and found to comply in all respects with the plans and specifications. Since its completion, the bridge had been used with the full knowledge and consent of the board. The board refused to pay plaintiff for the erection and construction of the bridge. The court held that the only way a board of supervisors can make a contract for public works is by an order entered upon its minutes, and in the absence of an order there is no express contract. For that reason the county cannot be bound by an implied contract, and plaintiff could not recover on a quantum meruit basis. The case was reversed and judgment entered for the county.

In *Austin-Western Road Machinery Company v. Webster County,*[21] bids for road machinery were invited by publication as required by law, and in response thereto appellant's bid was accepted; a contract was attempted to be made therefor and spread on the minutes of the board. The machinery was delivered. But the proof of publication had not been filed with the board or with the clerk at the time the contract was made; in fact, it was not shown that it was ever filed, before or after that date; and the order of the board, while reciting that publication had been made, was silent upon the point whether proof thereof was on file. The evidence outside the recitals of the order failed to show whether the proof of publication was in fact ever on file. The court said:

> . . . proof of publication must be on file as a jurisdictional prerequisite to enable the board to proceed. These cases followed the principle applied in *Oliver v. Baird,*[22] . . . wherein it was held that a judgment in attachment was invalid when there was no

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[20]127 Miss. 192, 89 So. 913 (1921).
[21]170 Miss. 601, 603, 154 So. 723 (1934).
[22]90 Miss. 718, 44 So. 35 (1907).

proof of publication before the court at the time the judgment by default was rendered. It was contended in the *Oliver v. Baird* case that inasmuch as the publication had actually been made, the absence of the proof thereof before the court at the time of the rendition of the judgment was immaterial, the law being concerned, so it was argued, only in the fact of the publication; and that is exactly the argument made here in urging us to overrule the three cases first above cited. With equal force it could be argued that the fact of the service by the sheriff of a personal summons is that with which the law is concerned, and that therefore a judgment might thereafter be taken although no return of the summons into court has ever been made by the sheriff. Where publication of notice is jurisdictional, as is the case here, the filing of the proof of the publication is the equivalent of a return in writing by the sheriff of a personal summons, and is equally indispensable.

It is to be regretted that parties dealing with these boards will sometimes, on account of procedural oversights, such as this, lose their demands for property furnished to and used by the counties; but we have no legitimate power, in order to prevent hard results in an occasional case, to set aside settled rules based upon sound legal principles.

In *Board of Supervisors of Lee County v. Payne,*[23] the appellee filed suit in the Chancery Court of Lee County against the board of supervisors of that county and one Christian, in which he sought to recover damages for breach of contract entered into between the board, Christian, and himself. The bill alleged that in December, 1931, the board gave notice of its intention to award contracts to the lowest responsible bidders who would furnish bridge lumber for the bridges of the county for the year of 1932, which notice was published; that in pursuance to such notice, the appellee and Christian submitted their bid to the board in which they offered to furnish lumber for the building and repairing of the bridges in the county for the ensuing year at certain prices for heart pine, red oak and white oak; and their bid was accepted by the board and entered upon the minutes, and the contract was executed. But the board ignored this contract and purchased a large amount of timber from other people. The court said:

The question for decision on this appeal is thus stated by counsel for the appellee: "Therefore the sole question before

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[23]175 Miss. 12, 18, 19, 23, 166 So. 332, 333, 335 (1936).

> the Supreme Court now is: Whether the board of supervisors, the only parties through whom a county can make a contract, can proceed strictly according to law in procuring a contract and enter into same and then afterwards wilfully and intentionally fail to carry it out and perform the same on their part while the other parties to the contract are bound thereby and at the same time create no liability on the part of the county to the other party to the contract?"
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> . . . .
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> Let it further be noted that there was no contract on the part of the county to purchase from the bidders, Payne and Christian, any specified amount of lumber; and their complaint is that they were damaged by reason of the board's breaching its contract and purchasing its supply of lumber from strangers.
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> . . . .
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> We have reached the conclusion that the statute does not expressly, or by necessary implication, confer upon the plaintiff a right of action for damages for the breach of a contract where no part of same is performed, and where the only recovery which can be had is in the nature of damages against the county for failure, by the governing board, in the performance of its duty. The demurrer interposed by the county should have been sustained.

It follows from the foregoing that a county is not liable on an implied contract, or a suit on a quantum meruit basis, or for a breach of a contract where no part of the same is performed, and where the only recovery which can be had is in the nature of damages against the county for failure, by the governing board, to perform its duty.

Suits By and Against Counties

At common law a county could neither sue nor be sued, and it is only by virtue of express or implied statutory authority that any action may be maintained either in its behalf or against it. In this state the legislature has provided expressly that a county is not liable to suit for any cause of action unless made by by statute. Such legislation is declaratory of the common law rule. As the right to sue a county is given by the state, it may be withdrawn or denied at any time when the legislature may think proper, providing all existing remedies are not wholly extinguished so as to impair the obligations of contract. The right of a county to sue may be given without imposing liability to be sued, and under some statutes the right of a county to sue is much larger than its capacity to be sued.

Code Section 2955 provides that any county may sue and be sued by its name, and suits against the county can be instituted in any court having jurisdiction of the amount sitting at the county seat; but suits shall not be brought by the county without the authority of the board of supervisors, except as otherwise provided by law.

The rights of a county to sue in this state is unlimited, and it may sue in any case in which its rights are affected; but the right to sue the county is regulated by the constitution and statutes.

Code Section 2958 expressly authorizes the board of supervisors to employ legal counsel by the year and to employ counsel in all civil cases in which the county is interested, and in criminal cases against a county officer for malfeasance or dereliction of duty in office, when, by the criminal conduct of the officer, the county may be afected pecuniarily, and to pay such counsel out of the county treasury a reasonable compensation for his services.

In *National Surety Company v. Board of Supervisors of Holmes County*[24] the board brought suit for the benefit of the county, instead of in the name of the county, and the supreme court reversed the judgment in favor of the board and held that "Suits to enforce the rights of the county must be instituted in the name of the county." But on suggestion of error[25] the court said:

> . . . the failure (of the surety company) to object then, so that proper amendment could be made, amounts to a waiver and precludes the surety company from raising a point on appeal, because the real party complainant, the county, was in court though not named as complainant in the pleadings.

It will be observed, however, that the proper way to bring a suit for and against the county is in the name of the county.[26]

Section 17 of the Mississippi Constitution provides:

> Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use

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[24]120 Miss. 565, 81 So. 792 (1919).
[25]120 Miss. 706, 728, 83 So. 8 (1919).
[26]See Noxubee County v. Long, 141 Miss. 72, 106 So. 83 (1925); Robertson v. Bank of Batesville, 116 Miss. 501, 77 So. 318 (1918); Allen v. Leflore County, 80 Miss. 98, 31 So. 815 (1902); Freeman v. Supervisors, 66 Miss. 1, 5 So. 516 (1899).

alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

The liability of a county under Section 17 can neither be controlled by the legislature, nor by the public policy of the state, and is self-executing.[27]

In *Tishomingo County v. McConville*,[28] the court held that under Section 17 a county which changes the grade of a street or road to the damage of an abutting property owner is liable for damages resulting to the property from such work.

In *State Highway Commission v. Mason*,[29] the court held that where heavy machinery was parked on lands under the owner's protest, when the machinery was not being used on highway work, the State Highway Commission was liable to the owner for damages caused. The principle involved necessarily applies to counties.

In another case[30] the plaintiff filed a suit against the county and alleged that a causeway was built along the public highway where it passed over his land, and that it was so negligently constructed that great injury was inflicted upon the plaintiff. The court held that the negligent or wrongful construction of the causeway, if taken to be proved, was the work solely of the road overseer. The board of supervisors gave no directions as to how the causeway should be constructed, and was not culpable in that regard. That the bad construction of the causeway was brought to their attention, and they failed to intervene in behalf of the plaintiff, did not render the county liable for the injury.[31]

Appeals

Code Section 2932 provides that any person having a claim against the county, which has been rejected by the board of supervisors, may appeal to the circuit court. The supreme court has held in the case of

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[27]State Highway Comm'n v. Mason, 192 Miss. 576, 4 So.2d 345, 6 So.2d 468 (1942); Parker v. State Highway Comm'n, 173 Miss. 213, 162 So. 162 (1935); Hill v. Woodward, 100 Miss. 879, 57 So. 294 (1911).

[28]139 Miss. 589, 104 So. 452 (1925). *Accord,* Parker v. State Highway Comm'n, 173 Miss. 123, 162 So. 162 (1935).

[29]192 Miss. 576, 4 So.2d 345 (1941).

[30]79 Miss. 238, 30 So. 636 (1901).

[31]*Cf.* State Highway Comm'n v. Hillman, 189 Miss. 850, 198 So. 565 (1940); Herod v. Carroll County, 162 Miss. 78, 138 So. 800 (1932); Jackson v. Monroe County, 124 Miss. 264, 86 So. 769 (1921); Covington County v. Watts, 120 Miss. 428, 82 So. 309 (1919); Vinegar Bend Lbr. Co. v. Oak Grove & G. R. Co., 89 Miss. 84, 43 So. 292 (1907).

Lafayette County v. Jones[32] that this section is not the only statutory provision authorizing appeals to the circuit court from disallowance of a claim by a county board. Section 1195 is the general statute providing for such an appeal. It states that any person aggrieved by a decision of a board may appeal within ten days from the date of the adjournment at which session the decision was rendered, and may embody the facts, judgment, decision in a bill of exceptions which shall be filed by the president of the board of supervisors. The clerk must transmit the bill of exceptions to the circuit court on or before the first day of the next succeeding term, or at once if the court is in session. It hears and determines the case on the bill of exceptions, and may affirm or reverse the judgment. If the judgment is reversed, the court renders such judgment as the board of supervisors should have rendered, and certifies the same to the board.

The bill of exceptions must ordinarily be signed during the term of the board at which the decision complained of was rendered, but it may be signed after the board's adjournment by agreement of the parties.[33]

When the bill of exceptions is duly presented, it is the duty of the presiding officer to sign it.[34] Only the president of the board of supervisors can sign a bill of exceptions upon appeals under this section, and if he refuses, he may be compelled by mandamus. Code Section 798,[35] providing for all bills of exceptions to be signed by attorneys where the judge refuses to sign, does not apply to appeals from orders and judgments of a board of supervisors.[36]

Appeals from the assessment of taxes are provided for by Code Section 1196. These may be taken without bond. Code Section 1339 provides that neither the state, county, municipality, nor any officer of the state seeking an injunction in his official character shall be required to give a bond to obtain an injunction. The matter of appeals from the assessment rolls of the county will be further discussed later under the subject matter of the assessment process and appeals from it.

Judgments

If a judgment is obtained against a county, it is the duty of the claimant to notify the clerk of the board of supervisors and, under the pro-

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[32]199 Miss. 373, 24 So.2d 844 (1946).
[33]Marshall County v. Stephenson, 160 Miss. 372, 134 So. 142 (1931).
[34]Polk v. Hattiesburg, 109 Miss. 872, 69 So. 675 (1915).
[35]Miss. Code (1906).
[36]Roach v. Tallahatchie County, 78 Miss. 303; 29 So. 93 (1901). See Monroe County v. Strong, 78 Miss. 565, 29 So. 530 (1900) (Appeals under Code Section 1195 may be prosecuted without bond); Wilson v. Wallace, 64 Miss. 13, 8 So. 128 (1886) (Any taxpayer may appeal under Code Section 1195 from a decision of the board of supervisors allowing a claim against the county).

visions of Section 2932, it is the duty of the board to allow the same, and a warrant shall be issued for it. A judgment, however, does not constitute any lien on the property of the county and the property of the county is not subject to sale under execution.

In *Grenada v. Grenada County*[37] the court said that it is well settled that public property of the county used in the administration of governmental functions can neither be levied upon and sold under execution, nor can a lien for a debt against it be enforced by foreclosure and sale. Such procedure would be against public policy, and would hinder and impair the administration of the governmental functions of the state and county. But where a judgment was rendered against a county, the board of supervisors may be compelled by mandamus to pay it if the county has money in its general fund, and if it has no general fund, it may be compelled to levy a special tax on the property of the county sufficient to pay the same.[38]

The Assessment Process and Appeals From It

The board of supervisors is the fiscal agent of the county. It has jurisdiction over assessment rolls, adopts the budgets, levies taxes, and establishes county depositories for the safe keeping of the county funds. The methods provided for these functions are purely statutory and in the exercise of such duties the board must comply substantially with the code. It has only such right, power and authority as is conferred by statute. The statutes of this state provides the method and procedure of assessment of banks, corporations, joint stock companies, personal property, and lands. This method for such assessments substantially must be followed. There are probably more attorneys who appear before boards of supervisors in cases of assessments of property than on any other matters. If they represent a bank, corporation, or any other taxpayer, they should study the statutory scheme involved, and the decisions of the Supreme Court of Mississippi construing these statutes before they file objections to the particular assessment involved. The matter of the assessment of the property of a county is perhaps one of the most important functions which the board passes upon, and involves so many considerations that I can only call your attention to the most important ones.

Code Section 9786 provides that the board of supervisors shall immediately at the July meeting proceed to equalize the assessment rolls and complete such equalization at least ten days before the August meeting, and shall immediately by newspaper publication notify the public that such rolls so equalized are ready for inspection and examination. The notice

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[37]115 Miss. 831, 76 So. 682 (1917).
[38]Town of Crenshaw v. Jackson, 122 Miss. 711, 84 So. 912 (1920).

provided by this section is very important. In *Henderson Molpus Company v. Gammill*[39] the court held that the notice herein provided for is jurisdictional and must appear of record to render valid the order approving the rolls. The minutes of the board should show the notice to taxpayers, given in the manner prescribed by law. It is necessary that such notice be actually filed with the board to give the latter jurisdiction to equalize the assessment rolls.[40]

In *Pettibone v. Wells*[41] the court said that the order of the board reciting that notice that tax assessment rolls were open for examination and had been published in the newspaper of the county, and posted in the court house, sufficiently showed that proof of publication was on file, notwithstanding the absence of evidentiary facts showing proof of publication.

But in *Downing v. Starnes*[42] the court held that a sale of land for delinquent taxes was void for non-compliance with Code Section 9786 providing for notice to taxpayers of the equalization of tax rolls.

Section 9788 states that at the meeting for equalization for assessments, the board of supervisors must examine carefully the roll or rolls, and then and there cause to be assessed any person or thing that may be correctly valued, and in the year of which the land assessment is made the board must examine the land roll, see that it embraces all of the land in the county, that all is correctly described, and that there are no double assessments. The board must cause all corrections to be made in the rolls, which, being done, the board enters an order approving the assessments, subject to the right of parties in interest to be heard on objections. The board holds a meeting on the first Monday of August to hear objections to the assessment.[43] It will be observed from the foregoing that the notice to taxpayers, required by Section 9786, must be adjudicated by order entered upon the minutes of the board at its August Term; otherwise the assessment for taxes will be void.

A person who is dissatisfied with the assessment may, at such August meeting, present objections to it in writing which shall be filed by the clerk and docketed and preserved with the roll. All persons who fail to file objections shall be concluded by the assessment and precluded from questioning its validity after its final approval by the board of supervisors, except minors and persons non compos mentis.[44]

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[39]149 Miss. 576, 115 So. 716 (1928).
[40]Federal Land Bank v. Cox, 183 Miss. 250, 183 So. 482 (1938).
[41]181 Miss. 425, 179 So. 336 (1938).
[42]35 So.2d 536 (Miss. 1948).
[43]Miss. Code § 9789 (1942).
[44]Miss. Code § 9790 (1942).

There is no particular form provided for filing these objections by a taxpayer who objects to a particular assessment. It may be in any form so long as it shows that he objects to his assessment, but it must state all of the facts of the case, and show why the assessment is excessive, or why such property is not subject to taxation, or whether the amount of the assessment is a clerical error, or any other reason why the taxpayer is entitled to relief. The petition or objection must be in writing, and signed by the taxpayer; and the taxpayer must file his objection on or before the first Monday in August, and see that his petition or objection is filed with the clerk of the board and docketed. The taxpayer should appear before the board at the August Term and present his proof. If his objections are sustained or rejected, he should see that an order to that effect is entered upon the minutes of the board, and especially so if he should desire to take an appeal, or otherwise he would be precluded from questioning the validity of the assessment. The appeal by a taxpayer from his assessment is governed by Code Section 1196, as heretofore stated.

In *North v. Culpepper*[45] the court held that objections to an assessment must be filed or the person assessed will be precluded from questioning its validity. And where the taxpayer did not make objections to assessment in writing, but objected orally, he was concluded by the assessment and could not appeal.[46]

There has been some confusion as to the time within which a taxpayer may appeal. The confusion has come about by the provisions of Code Section 9786 which requires the board to enter a final order approving the assessment rolls at the August Term; but since the creation of the State Tax Commission, our court has held in the case of *Moller-Vanderboom Lumber Company v. Attala County*[47] and in other cases, that the order entered at the August Term is an interlocutory order, and not a final order. The final order is that one entered by the board after the Tax Commission has approved the assessment rolls.

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[45]97 Miss. 730, 53 So. 419 (1910).
[46]Adams County v. Bank of Commerce, 157 Miss. 249, 128 So. 110 (1930).
[47]135 Miss. 249, 99 So. 823 (1924).

FEDERAL-STATE RELATIONSHIPS

*Harold J. Gallagher**

I thank you, Mr. President, for the cordial invitation to address you this evening.[1] I am glad to come to this fine old city with its historical old court house of which I had heard so much; a city named in honor of one of our most notable American patriots and statesmen—one of the greatest exponents of the sovereignty of the states and an ardent advocate of the rights of the states.

It is quite appropriate, I think, that I should discuss with you this evening in Jackson a subject which is increasingly becoming a matter of the deepest concern to all thoughtful people in our nation—to all those citizens who truly revere our institutions and form of constitutional government—to all those who value above everything else the fundamental principles which the founders of our nation, with an inspired vision, sought to establish and thought they had established in the Constitution of the United States. I often wonder what Andrew Jackson would say if he could but know how completely the power of the states has been destroyed even without the formality of a constitutional amendment.

The Past Twenty Years

During the last twenty years our world has been remade by two world wars and a major depression. As a consequence, we have seen the functions of our state governments greatly change. One writer even goes so far as to say, "Although the sun has not yet set on state sovereignty in the United States, the twilight of the states has begun." "If this is true, what is to be done about it by your association, and by your state bar association? What is to be done by the American Bar Association?

At no time as in the past twenty years have the power and the functions of the states been so challenged. At no time has there been such effort on the part of a particularly aggressive Federal Government to assert jurisdiction and control over matters which heretofore were universally regarded as functions solely of the states. The thinking of those who drafted the Constitution was clear. They were citizens of the colonies. They did not trust the newly established central government. With them states' rights, naturally, were a fetish. "We, the people"—the ultimate sovereignty—gave to this new central republican form of government only such powers as were necessary for its limited functions. All other powers

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[1]An address to the Hinds County Bar Association, Jackson, Mississippi, December 9, 1949.

not so expressly delegated were expressly reserved to the states. The Tenth Amendment was intended to make plain beyond question this retention in the states of all powers not specifically delegated to the Federal Government. What was created was a federal, not a national government. What was created was a Republic not a Democracy.

Under the pressure of the growth of the nation, a growth unparalleled in the history of any people, great and fundamental changes have now been made. From a point where state rights were carefully and zealously maintained, the pendulum has now moved sharply in the opposite direction and is continuing to move in that direction further and further with increasing momentum. There has been a greater enhancement of the federal powers in the last twenty years than in all the previous years of the nation's history. In the crisis of the great depression, and in the face of such an asserted need, no constitutional difficulty was permitted to prevent or retard the movement. The virtual amendment of the Constitution was done judicially. It was claimed that the action required to protect the nation's interests could not be secured by the slow and diffused action of forty-eight states. Furthermore, it was said it could not be effectively secured by state action backed by the states' less effective taxing power.

Under the decisions of the Supreme Court, no power appears now to be lacking in the Federal Government to regulate any important function of education, finance, public health, production, labor and agriculture. Up until ten years or so ago such functions had been regarded for the most part as affected merely with a state, and not a national interest.

I have deliberately brushed lightly over questions about which there may be a variety of opinion. It is not my purpose to discuss whether, considering the fundamental character of these changes, they might better have been left to the more seasoned and calculating processes of the constitutional amendment; nor do I intend to discuss whether the processes of reasoning by which the Supreme Court reached its conclusions were opposite to those of the drafters of the Constitution. The Supreme Court has apparently now done its work. The Constitution has now been interpreted, at least by the present court, to establish the greater measure of power claimed for the Federal Government and said to be necessary for its control of matters heretofore regarded as solely intrastate. The country is now faced with the practical question, where do we go from here? What should be the nation's policy in the distribution of functions between the Federal Government and the states, from here on accepting for this purpose the principle that the Constitution supports such distribution as may be found to the good interest of the people? As a matter of policy, and in the cooler atmosphere of long range calculations possible now that the crisis and the emergency conditions under which these great changes were

made are over, what should be the road of the future? This is a question upon which the states should be heard.

Under the impulse of the movement toward the breakdown—indeed we might even say the destruction—of the state powers, we have witnessed a great and increasing governmental centralization in Washington. This is, obviously, just the beginning. For the decisions of the Supreme Court would seem, as I have stated, to justify an assumption of power as to matters not yet touched. Without attempting to state a complete list, there exists today federal control of both state and interstate transportation by all of the various means of transportation, as well as of all communications. Most of the important phases of business are controlled by the Federal Government through laws governing trust and monopolies, trade practices, the issuance and sale of securities, federal and state banking, water power, electricity and gas. There is complete control over the employer-labor relationship in point of wages, hours of labor, labor relations and social security. Farm production is controlled, farming is subsidized, and a farm loan system is provided. The Federal Government regulates cotton and grain standards and the dealing in grain futures. It controls the packers and the stock yards, the grain warehouses and the sale of insecticides. It conducts bureaus of animal industry and dairying. It appropriates money to the states for hot luncheons for school children, provides maternity and infancy care, the door being thrown wide open for every sort of federal welfare legislation. It regulates the health of the citizen by statutes bearing on the sale of narcotics, foods and drugs. It is expending vast sums to aid the states in highway construction. It is embarking on a great program of education in the states. You would think from the multitude of bills for welfare legislation in the Congress that the federal treasury had fathomless depths of wealth, even though the Federal Government can obtain its funds only from the people of the several states.

The drive toward using federal grants in aid for supporting various public services is definitely on the increase. In fact, the Federal Government now finances, in a very substantial way, both the state and local governments. Forty per cent of all funds expended by the 165,000 units of local government is derived from federal grants; and fifteen per cent of all the funds expended by the state governments is so derived. The representative of the state in the Congress is very willing, and we might say eager, to support what would be a consistent policy of extravagant spending for the state to indulge in, but which looks less like extravagance and even appears worthy when done with federal funds.

All this results in the building up of a great centralized government and bureaucracy. It results in a tremendous federal personnel, since all these regulatory statutes require complicated administration. There has,

therefore, been a great increase in the number of federal employees and in some states they outnumber the state employees. They are definitely increasing. The government becomes bigger and bigger—and further and further removed from the people; and less and less responsive to their control.

Perhaps the most serious thing about turning the citizen to Washington is the effect that it has upon his attitude towards his government. A fundamental of our democracy is his right and duty to participate in government. When a centralized government is developed at Washington, he finds himself subjected to the remote action of a distant agency, whose efficiency is decreased by its remoteness and by its size, and in which government the citizen has little participation. The citizen finds that whereas he is one of 1,000,000 voters dealing with the government of his own state, he is one of 50,000,000 voters dealing with the Federal Government, the seat of which is a thousand or more miles away. At remote intervals he participates in this government by voting for its president, two senators and a congressman. His indifference to this very limited opportunity to participate is shown by the fact that only about 50 per cent of the eligible voters voted at the last presidential election. Thus, the effect of the changes which have been wrought is to centralize power in one great government, to which the people are being taught to look for their welfare, but in which their participation has decreased.

At the same time, while the citizen now looks to Washington from whence cometh his strength, but in which government he cannot effectively participate, the dignity and prestige of his state government declines. Competence in government grows with the responsibility and the exercise of power. The efficiency and effectiveness of the state governments diminishes proportionately to the loss of such functions. So does the performance of their functions by men experienced and competent in the governing art. The citizens' participation in and respect for that state government will decline correspondingly.

There is much to be said about the inefficiency of this centralized federal administration. In the past, the difficulty arising from the growth of the Federal Government has presented problems to which we have not developed an adequate answer. The concentration of power in Washington will result and indeed has already resulted in a tremendous increase in the legislative burdens of the Congress. It is already overburdened with the legislation which involves all the unquestionable national problems.

With the growing need for legislation involving international problems now that the nation is assuming world leadership, the Congress will also have to bear the additional heavy load to legislate regarding the local

and domestic problems for which the Federal Government is assuming the responsibility. The great burden which Congress bears is evidenced by the slowness with which Congress moves.

Since the Congress itself has been unable to perform the functions which have been put upon it, it has been forced to unload as much as possible upon administrative bureaus, acting under general delegations of power. This extension of the Congress in legislating on matters of local significance gives no promise of efficiency. In my opinion it does more. It threatens the breakdown of the proper legislative functions of the Congress itself.

The people of the states are the ultimate sovereign by whose act the Federal Government was created. It was they who gave the powers to the Federal Government here in question. This creation was the result of a careful and deliberate study. The present reconstruction of the governmental structure by judicial constitutional amendment is action of equal stature and of no less magnitude. The evolving of the body of the civil or criminal law by the pin-prick method of single decisions, in cases in which only personal litigants are represented, is entirely appropriate for that type of law. But the amendment of our Constitution is of an entirely different order. It is unfortunate that it could not have been accomplished with the full participation of the states and with the same care and study given the original drafting of the Constitution.

This is particularly true when the condition of the times in which these judicial amendments were made are considered. The decisions confirming the exercise of federal power at the expense of the power of the states were made in times of emergency due to the great depression and the wars, when centralization of power and concessions to create unity were the order of the day. Emergency conditions are not appropriate for the formation of constitutional changes in the basic structure of our government in times of peace and prosperity. The power to regulate matters of local concern should not be given to the Federal Government simply because it happens that at the time the Federal Government is better able financially to pay the cost. The breakdown of the state functioning has been caused in part by the financial weakness of the state and local governments. That weakness has in part been due to the failure of the states and Federal Government to provide an appropriate coordination of the exercise of their respective taxing powers. The result of this failure was to create a disproportionate division of the available tax income between them. This is a matter now under scrutiny by a joint movement of the federal and state governments.

Under the emergency conditions which prevailed, these invasions of the authority of the states were generally not resisted by the states. As

the result of a willingness to accept the expenditure of federal funds and the participation of the Federal Government in connection with matters heretofore regarded as of only local interest, the states have suffered a loss of sovereignty and of dignity as well. They have apparently been unwilling to strike blows for states' rights with one hand while accepting federal bounties with the other. Under the doctrine of *Mellon v Massachusetts,*[2] the taxpayer was powerless to intervene in such cases.

What Can Be Done?

In the light of these considerations my conclusions are these: Obviously the present, and the probable further, breakdown of the powers of the states and the further concentration of power in a centralized government involves gravely serious questions both in point of effect on the people in changing their allegiance from the state governments to the Federal Government and in point of the efficiency of the administration. Plainly, serious problems attend the building up of a great centralized government. It is plain that a great centralized government will be a dehumanizing force. It seems true that now that the way has been cleared to continue the building up of a centralized government, it is impossible to say how far that centralization will proceed. How far it should proceed is a question which should be hammered out on the anvil of public debate. Obviously, before it is too late, the whole problem should receive scrutiny as careful and as thorough as was given to the problem when the original distribution of powers was made. The states should rise to the defense of a sound distribution of power, which, in the changed times, will be in the good interests of the people. To that end the whole question should receive careful study by an authoritative body which is representative of all who are concerned and which can work out a sound distribution. The problem should be divorced from these considerations of an emergency nature. It should be assumed, for example, that the states will be fully able to bear the financial responsibilities which are naturally theirs. It should be provided, as the result of the pending efforts on the part of the state and Federal Governments to secure a proper coordination of the use of their taxing powers, that the states will secure their full share of the tax revenue.

Such, in general, is the conclusion reached in the recent Report of the Hoover Commission. The report states that the distribution of powers between the states and Federal Government has cast the problem in bold relief of how the American type of democracy, which is based on individual and extensive citizen participation in and control of the government, can

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[2] 262 U.S. 447 (1923).

be maintained and strengthened and how at the same time the government will provide the services which are necessarily demanded for the general welfare.

This report recommends that a continuing agency on federal-state relationships be created with primary responsibility for the study and for the development of information and guidance in the field of federal-state relations. The report proposes that the functions and activities of government be appraised to determine which can be most advantageously operated by the state and Federal Governments and which require joint policy making. It is recommended, further, that the tax systems be generally revised and that, in this revision, every possible effort be made to leave to the localities and the states adequate resources with which to meet the duties and responsibilities of the local and state governments. Such an agency should be established by federal legislation. It should include representatives of the Senate and the House, together with representatives of the federal executive and of the state and local governments, industry, agriculture and labor.

I strongly urge that your association support this proposal. This would give a means and opportunity for a reconsideration, and for a new orientation, of the whole problem and for such action, even to a point of constitutional amendment if necessary, as may be required to bring order out of chaos and to prevent the present head-long movement toward the breakdown of the state governments and the transference of their duties to the Federal Government. It will give you, as citizens interested in the right development of the states, the opportunity to get the distribution of powers founded in a more reasoned consideration.

With the breakdown of the sovereignty of the states and, as a corollary thereto, we appear definitely to be embracing whole-heartedly the idea of the welfare state. Former Secretary of State Byrnes has stated recently that we are far on the road to statism. Many others are saying the same thing. It is high time, before it is too late, that the lawyers of our nation, if they are to be true to their high ideals and traditions, will take the leadership in a cause to preserve our form of government, and the blessings we enjoy as individuals and as free men under the Constitution.

The Function of Bar Associations

To be effective in this and other matters both of a professional and of a public interest, the legal profession must be strong and well organized. Today, in the light of current events, there is greater need than ever before for the strengthening of the organization of the entire profession if lawyers are to perform their duty to their profession and to our country.

The lawers of our nation can do as much today as ever in the past to aid in the solution of these vexing problems.

If we are to be prepared to resist the socialization of the bar, as today threatens the medical profession, and indeed if we are to be a formidable force in preventing the socialization of all industry under a so-called "welfare state", we must strengthen without delay the organized bar of the entire country. We must, as Elihu Root once said ". . . weld together all the separate bars of our several states into one body of common understanding, common sympathy and common purposes inspired by a spirit of public service."

The ties between the American Bar Association and the state and local associations must be bound more closely together to enhance the influence of the organized bar throughout the nation. It was in order to effectuate that idea that in 1936 the American Bar Association adopted a new constitution creating the present representative House of Delegates. By reason thereof, all aspects of opinion are available in meetings of the House and full consideration of problems presented can be had. As a consequence it is well recognized that when the American Bar Association speaks it most truly represents the thinking of the whole legal profession.

The first step in organization of the bar of this country on a national basis was taken when the American Bar Association was established in 1878. The second really great step was the creation of the present House of Delegates by the Constitution of 1936. It is now time for us to take the third and equally essential step, that is, to strengthen the ties between the American Bar Association and the state and local associations. During the coming year it is my ambition to emphasize, develop and bring into closer contact, these three relationships: those between the American Bar Association and the state and local associations; those between the American Bar Association and its individual members; and those which will perfect the organization and integration of the sections and the standing committees of the American Bar Association itself. The latter objective is being undertaken most successfully by the very outstanding Committee on Scope and Correlation of the Association.

I hope to stimulate in every state and local organization a personal feeling of the tremendous value and imperative need of organization, as well as a recognition of the value of participation in meetings of the bar on local, state and national levels, and of the vital necessity for united consideration and serious study of the multitude of present problems facing the profession as craftsmen and, more important, as leaders of public opinion.

In order to coordinate the bar activities and the integration of effort of the American Bar Association with state and local bar associations, the Board of Governors at its meeting on November 4th and 5th, last, authorized on my recommendation the appointment of a special committee to accomplish that objective. It is hoped that, through the work of this committee, committees will be established in state and local associations whereever practicable to take action in respect of the same general matters as are covered by the various sections and standing and special committees of the American Bar Association to the extent that such matters are of interest to the lawyers in the state. It is hoped that it will be possible to work out arrangements whereby under cooperative action these committees will be representative of the American Bar Association, as well as the state and local associations, so that a given matter in which the organized bar is interested will be dealt with from the national association down to the local organization, and from the local organization right up through the national organization by the corresponding committee in each group. The great reservoir of ability among the lawyers of the small towns of the nation should be tapped, and it is my conviction that they will gladly respond to this call for public service. In a national way, the American Bar Association is equipped to present to Congress information about legislation of national interest, reflecting the activities of our association, but we are entirely dependent on the state and local associations for performing a similar function in their own communities. Almost as important is their function in leading and influencing sentiment in support of national legislation within the objects and purposes of our association. By this means, we are doing our best to meet the very stimulating suggestion contained in the October issue of the *American Bar Association Journal* in the communication in the "Views of our Readers" section entitled, "Where is the County Lawyer in the Association?" We want him an integral part of the association.

The Board of Governors has placed upon the state delegate in each state the burden of organizing this work and I have written letters to all of them outlining this plan of coordination. I have also written to all of the state bar presidents calling attention to the plan and urging their attendance at a conference of bar association presidents in Chicago on February 25, 1950, at the time of the mid-winter meeting of the House of Delegates, to perfect finally the plan of coordination and integration of effort.

There are many activities of the American Bar Association in which members of the state bars and of local bar associations have a common interest. I wish I had the time to tell you about all of the activities of the American Bar Association. I would like to tell you about the program as

to the Lawyers Reference Plan, a plan to supply legal services to persons of moderate means. A committee has been appointed by the American Bar Association to sponsor this movement. I fervently hope that all bar associations in communities of over 30,000 will do just that. Through this means lawyers will obtain clients they would not otherwise have had, and persons of moderate means will be able to obtain competent legal advice for moderate fees.

There are many more things I would like to tell you about, but time does not permit. I must refer, however, to the Committee on American Citizenship and the work that it is doing and what it proposes to do. In these days when fundamental changes are proposed by subversive organizations working assiduously to undermine the foundations upon which rest our form of Government, both state and federal, it is important that we as lawyers assume our share of the responsibility of educating the people, and particularly those of school age, in the rights and in the obligations of American citizenship. It is in this field that the American Bar Association Committee on American Citizenship has set up a program that is extremely important. This committee is prepared to work in close conjunction with similar committees in each local and state bar organization, with the end in view of assisting the local organizations in bringing home to their own people the blessings which we enjoy under our Constitution and democratic form of representative government. No one is better equipped to assume the responsibility of this job than is the lawyer, and in this particular instance the cooperation of the members of the Junior Bar Conference and of young lawyers throughout the nation insures that the program will be carried forward with the vigor and enthusiasm of youth.

Finally, a word for us as officers of the courts and as devotees of the "jealous mistress." The law continues to be one of the great professions. Its surpassing function is the orderly resolving of conflicts. Social order is impossible without the manly and honorable discharge of that function. There are times when we must lead unpopular causes not subscribed to by many of our fellowmen. We dare not hesitate to fight ill-founded or unreasonable demands, and we cannot stand back when the call comes to serve human needs.

Without the work of judges and their advisers, the lawyers, American concepts of liberty might not be what they are today, and above the "whir and din" of our engrossing civilization, lawyers may be depended upon to hold fast to the highest aspirations of our calling.

Gentlemen, I wish I possessed the power and eloquence of a Burke or a Webster that I might kindle deep in your hearts and souls a firm reso-

lution to join in a great national crusade of the legal profession. If I could so imbue each of you with that same determination, it would be possible to organize the Bar of the United States in each community on a firm and solid basis united in purpose and spirit to insure the ultimate achievement, without possibility of failure, of the positive and necessary objectives of our profession.

The American Bar Association invites every lawyer in the country to participate with it in this great public crusade, which has for its goal the happiness and prosperity of all people.

The substance is vital. Our generation will not be granted the time to proceed at a leisurely pace. The enemies of our institutions are known; they are pressing the attack and our response must be swift.

We know the answer. Let every lawyer proceed to carry out his noble obligation to his profession.

In the words of Lord Bacon, the great Lord Chancellor—"I hold every man a debtor to his profession. From that which he doth expect honor, he should be prepared to give thereunto something of himself."

State Bar Section

A DYING CONFESSION

*Tom Q. Ellis**

A young man fired with pep and zeal approached his doting Paw,
And said "Above all other things, I wish I knew the Law."

So Law it was, he entered school and wafted like a breeze
To topmost heights where he was crowned with all the Law Degrees.

And then he hung his shingle out and folks from far and near
Came rushing in to learn the law from one who had no peer.

And soon he mounted to the Bench—the highest in the Land,—
And there as Judge and Counsellor dispensed blind Justice grand.

For years and years his word was law, his reputation grew,
And none would dare to challenge him about the law he knew.

But Father Time must take his toll, when years have quickly sped,
And so this Judge and Counsellor came down to his last bed.

His breathing gasps came quick and short, his life was ebbing fast,
And many gathered 'round to hear some wise words as his last.

They huddled close and bended low—and listened, jaw to jaw,
But shocked they were when he confessed, "I wish I knew the Law!"

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*Clerk, Mississippi Supreme Court.

THE MISSISSIPPI STATE BAR

*Phil Stone**

This is not really an article. Rather what follows are simply some random observations and suggestions based upon many years' service as a member of the Mississippi State Bar, upon four years' service as a member of the State Bar Commission and upon one year's service as president. None of these observations and suggestions are offered as sacred dogma. It is hoped that they will arouse the interest of other members of the Mississippi State Bar and may provoke criticisms and suggestions.

The suggestions offered will deal with the following:

1. The State Bar Commission.
2. The annual convention.
3. The qualifications of a president.
4. The committees of the State Bar.
5. Increased revenue for the State Bar.

The State Bar Commission

As is known to all, the State Bar Commission is really the governing body of the association. It fixes the budget, authorizes expenditures, handles complaints for unethical conduct and generally governs the association. The president presides at the meetings of the commission. While the president presides there in very little else he can do other than to preside except to make suggestions that the commission may or may not follow, as it sees fit.

As is well known, there are seventeen members of the commission, one for each circuit court district, and such members are elected annually by the members of the bar of their respective districts.

There seem to have grown up two very different methods regarding the election of commissioners. While there are always exceptions to the general rule, my own opinion is that neither of these methods is the most satisfactory from the standpoint of the association.

The first of these methods, and one which is followed by only a few districts, is to re-elect the same commissioner year after year. In passing,

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I must admit that such system has resulted in securing the services of one member whose services have been extremely valuable to the commission. Still, I consider this just an exception to the general rule, and in spite of this particular instance I do not believe that it is a good thing to continue to maintain the same commissioner in office year after year.

The second system is the election of a different commissioner from a different county every year or what is called the rotation system. My experience leads me to believe that this system is worse than the first one.

I have come to the conclusion that a much better system would be for a district to elect a commissioner from one county for three or four years in succession and then to elect a commissioner from another county in the district for a similar period of time, and in this manner to continue to rotate the district's membership on the commission from county to county.

It seems to me that the two things to be desired are that the commissioner should be familiar enough with the workings of the commission and of the association to be of some benefit to his district, and that as many lawyers in as many counties as possible should know something about the workings of the association. If the same commissioner is maintained in office for a period of ten or fifteen years the lawyers in other counties in the district tend to lose interest and have little knowledge or contact with the mechanics of the association. On the other hand, since the commission meets only four or five times a year, it is going to take a new commissioner just about one term to find out what the whole thing is about and to learn how he can best be of service. As is true in all such bodies, the commission is really run by a few men who have been on the commission long enough to know what it is all about. I do not mean that such men attempt arrogantly to take charge of the commission and to run it for their own purposes. In the four years that I served on the commission and during the year that I was president, I never saw the slightest indication of any such attempt. It is simply that the men who know the workings of the commission have to take the lead or nothing would ever be done.

If a commissioner should serve for three or four years then he would have learned enough to be of great value to his district. On the other hand, if the membership on the commission were rotated every three or four years among different counties in the district, we would thus build up a body of lawyers who knew how the association was run. In a few years, any lawyer in any county who wanted to know something about the association would have in his county a man who had served on the commission and who could inform him. Thus many unjust opinions about the association could be corrected at the source.

Also, we would thus build up leadership for the association and leadership is something that I think we lack in the Mississippi State Bar. Any association that expects to survive, to grow and to be efficient, must vigilantly and constantly build up leadership and experience and responsibility among its younger members.

Another minor suggestion is with reference to the Complaint Commissioner. At present, the commission has one member who handles all complaints about unethical professional conduct. This is too great a burden for one man and I think that this particular work of the commission would be more efficiently conducted if the commission would have two complaint commissioners instead of one. The secretary of the association could be instructed to rotate complaints alternately between these complaint commissioners.

The Annual Convention

It is the custom to hold the annual convention in June. On Thursday afternoon of the week in which the convention is held the Junior Bar meets. The regular convention opens Friday morning and usually adjourns Saturday noon.

Now I do not think that one-half day is sufficient time for the splendid work that is constantly being done by our Junior Bar Section. In fact, the work done by the Junior Bar Section is such as to shame the efforts of us older members of the association. Therefore, I think an entire day should be set aside for this meeting of the Junior Bar Section.

Being a country lawyer myself, I know how important it is for most country lawyers to be in their offices on Saturday, although I do duck out of my own at noon Saturdays. This is so true that many of the ablest and wisest of our members frequently cannot stay over for the Saturday morning session and thus are not present to take part in the election of a president for the ensuing year. Therefore, it seems to me that the convention should be moved up one day in the week, thus making the Junior Bar Section convene on Wednesday of the week and the regular convention open on Thursday and conclude on Friday. I think this would enable more lawyers, and more lawyers of the most desirable type, to be present at all sessions of the convention.

The President

The longer I am a member of the Mississippi State Bar and of the American Bar Association the more I am convinced that our system of electing presidents is not satisfactory although we have had some splendid presidents.

In the first place, no man who has not served on the State Bar Commission knows enough about the workings of the Association to make a satisfactory president. I think it would be a good idea to amend the constitution so as to require that a man would have to serve at least one term on the State Bar Commission before he would be eligible for election as president. It will probably not be fair to make such amendment effective immediately, but it could be made effective five years or ten years from the date of its enactment. Such provision would make more able lawyers ready to serve on the commission. It would also furnish us with a president who knew something about the workings of the association. Our present President, Hon. R. W. Thompson, Jr., of Gulfport, served on the commission for ten or twelve years and did splendid service as Chairman of the Budget Committee.

Either this change should be made or the president of the association should be elected on Friday of the week in order to secure his election by membership that is not only nearer complete but is also better informed. I have made this suggestion in the past to other lawyers and some of them have replied that if we did this we would have nobody left for the session the following day. That may be right but I think there are two answers to such theory. The first answer is, it seems to me, that members of the association who care nothing more about the association than the election of a president are not much good to the association anyway, and they might just as well be at home. The next answer is that every Saturday morning of the convention there always turn up a number of lawyers who have a favored candidate for president, and most of such lawyers have done nothing during the year in the work of the association and never do any of such work. A number of the lawyers who do the work of the association have gone home and the result of the present procedure of the election of a president on Saturday morning can, and sometimes does, result in the election of a president largely by a minority of members who are not even interested in the work of the association.

As time goes on, I am also impressed with the method followed by the American Bar Association of making its future presidents earn the office by doing the drudgery connected with the work of the association, by making him, as I have frequently said, for years dig the ditches and shovel the manure. In this way, almost every president of the American Bar Association is, before he becomes president, entirely familiar with the workings of the various sections and commissions of the American Bar Association. I think we should do the same thing. If a lawyer does not care enough about being president of the Mississippi State Bar to do the hard, thankless work that has to be done, then he has no right to expect

his brother lawyers to elect him. If he wants to be president, let him earn it first.

In the third place, any man who expects to be elected president of our association ought to be first reconciled to the fact that if he expects to be a good president he is going to have to neglect his own private business at least half of the time during the year of his term. If he is not willing to do this or if he cannot afford to do this, then he should not expect to be elected.

Committees of the Association

I learned by experience what Hon. Stokes V. Robertson of Jackson, my predecessor as president, told me at the beginning, and that was to get all committees set up as soon as possible. Every president should make this his first job when he is elected and every committee should be selected and functioning not later than the middle of August.

I believe that the best composition for every committee is to retain on each committee some members who have served on that committee for the previous year, to have some new members, to have some members who are middle-aged and some who are young. Those who have served on such committees for the previous year can save their membership a lot of time because of their familiarity with what was done and what was not done by that committee during the previous year. It is unwise, usually, to retain the entire membership of such committee for a past year because by having new members serve on the committees we are doing something to build up the future leadership for the association. A number of the members of such committees are very busy lawyers and it is a hardship and a sacrifice for them to serve on these committees. By having on the committees young lawyers who are not so busy the detail work of such committee can frequently be done by these young lawyers under the direction of the older lawyers of the committee. In this way the time of the older, busier lawyer is saved and the younger lawyers acquire experience and knowledge that are very valuable to them and will later be very valuable to the association.

Also, the younger lawyers have a chance to come in contact with the older lawyers and with the judges and may, in this way, make such favorable impressions that they are likely to profit by them in their private practice. An example of how such a situation functions was shown in the Study Committee during the year that I was president. Justice L. A. Smith, Sr., was the chairman of that committee, and Hon. John C. Satterfield of Jackson, was the secretary. Most of the detail work was done, under the supervision of Justice Smith and Mr. Satterfield, by Hon. Robert G. Nichols, Jr., of Jackson, a young lawyer just admitted to the bar.

In other words, this system makes the younger lawyers do the detail work which the older lawyers do not have time to do thoroughly and lets the older lawyers of the committee act in an advisory and supervisory capacity, and thus enables them to use more effectively the wisdom and experience they have accumulated through the years and which wisdom and experience the younger lawyers have not had time to accumulate.

Of course, in all committees there should be as wide a geographical distribution as can be obtained. The reasons for this are obvious.

Also, it is always desirable, if possible, to have on each committee some members of each house of the legislature. In this way, we have on the floor of each house of the legislature informed and effective spokesmen for the various programs of the association.

Finally, we cannot expect to have many meetings of such committees nor are many such meetings necessary, even though they may be desirable. Most lawyers in Mississippi simply do not have the time and the money to spend several days in meetings of such committees several times a year. We found that the business of such committees could very well be transacted efficiently by having only a preliminary meeting for oganization and a final meeting to pass upon the report that such committee was to make to the convention, transacting their business in the meantime entirely by mail. If you want to get the best, wisest and most experienced and efficient members of the association to serve on such committees, you have to have some consideration for the time and work required by their other obligations. Otherwise you will not get such men to serve.

Increase of Revenue

Undoubtedly, the dues of the Mississippi State Bar should be increased from $5.00 to $10.00 per year. The association simply does not have enough money to conduct its work efficiently. Trying to do this work with the revenue now available is like a man who does not paint his house often because he is trying to save money. In these prosperous times I don't belive there is any lawyer in Mississippi who could not pay dues of $10.00 per year. He pays that much for his privilege license.

Perhaps, as has been suggested to me by some of the most prominent lawyers in Mississippi, we might be better off if we should go back to the voluntary association we used to be. However, the integrated bar is the fashion now, and it does have many advantages and possibly it is too late now to consider a change. The American Bar Association has for years advocated integrated bars for the states but the American Bar Association is itself a purely voluntary association and, as I have observed to many of its members at various times, I have never heard any member of the American Bar Association advocate that it be converted to an involuntary association.

However, this is all water under the bridge. We have an integratd bar and we have to deal with it on that basis. Many of its members now rebel against paying even $5.00 per year in dues. No doubt many more would rebel at paying $10.00 per year. But if the work of the association is to be efficiently carried on it must have more money and it should be possible, over a period of time, to explain to the great majority of members of the Mississippi State Bar and to demonstrate to them over a period of years that they would actually profit from these additional dues because, by having this additional revenue, the State Bar would be enabled to do more things which would make it possible for more of its members to make more money.

One example of how additional revenue could be wisely spent is in furnishing the various committees with money to pay the actual expenses of its members, to pay for actual stenographic expense, and to enable every committee to do, as the various sections and committees of the American Bar Association do, in printing and sending out to every member of the State Bar the proposed report of such committee far in advance of the annual convention. In this way, the committee can get suggestions and criticisms from all members of the State Bar. In this way the reports of such committees can be finally drafted so that any controversy over such reports will be almost entirely eliminated before the annual convention. The time saved at the convention by such a method is enormous. At the 1949 Convention the Study Committee was able to do this. The result was, that with something over twenty recommendations in this report, there were only two or three minor amendments offered from the floor, and the whole report was finally disposed of by the convention in less than thirty minutes and the job was thoroughly done.

Finally, some way should be devised so that the State Bar could receive gifts and bequests, and thus set up an endowment fund the income from which could be used to promote the interests of the lawyers of Mississippi.

Conclusion

In conclusion, if the Mississippi State Bar is ever to function efficiently, we must cultivate more our younger members. We must cease to treat the Junior Bar Section like a stepchild. These young men are the men upon whom we are soon going to have to lean for leadership. They will learn to lead only by leading. If we are going to have leaders for our State Bar, more of these young men must be put upon committees, must be elected to the State Bar Commission, must be given other jobs to do and given full recognition for faithful and efficient service performed. If we do not develop leaders we shall perish.

RULES OF MISSISSIPPI CHANCERY COURTS

*Thomas Y. Minniece**

The rule making power of our courts has been a controversial subject in this state for a number of years. It is not my purpose to go fully into the matter of the advisability of courts making rules for practice, pleading and procedure, or their power to do so.[1] The power of trial courts to make their own rules of practice and procedure seems to have been settled in this state in *International Shoe Company v. Garfinkle*[2] and *Kline v. Sims*.[3]

In the case of *McAllister v .Richardson,*[4] the Mississippi Supreme Court said:

> There are some who seem to consider a trial judge a mere figurehead. They are wrong. He is the presiding officer of the court and should control all of the proceedings, and should require that the court be conducted in an orderly and dignified manner with due formality.

Our court did say in *Pickett v. Pickett*[5] and *Kline v. Sims*[6] that a rule of court must not conflict with the substantive law. And in *Y. & M. V. Railroad Company v. Kirk,*[7] the supreme court said that rules must be reasonable, that their rules had no application to the trial courts, they had no authority to prescribe such rules for trial courts, and had never attempted to do so. But in practically every case in which our supreme court has construed rules of the trial court, they have been given a very liberal interpretation.

Origin of the Rules

The rules of today really have their origin in the Laws of 1920.[8] By statute, the chancellors and circuit judges were given rule making power by the legislature through a back-door method. This legislation raised the salaries of the circuit judges and chancellors from $3,000 to $4,000 per year, and in order to circumvent the constitution[9] and give the incumbents an immediate raise, provided that a commission should be created of the

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[1]See Note 110 A.L.R. 22 (1937); Note 158 A.L.R. 705 (1945).
[2]146 Miss. 799, 112 So. 168 (1927).
[3]113 So. 190 (Miss. 1927).
[4]103 Miss. 418, 434, 60 So. 570, 572 (1912).
[5]1 How. 267 (Miss. 1836).
[6]See note 3 *supra.*
[7]102 Miss. 41, 58 So. 834 (1912).
[8]Miss. Laws 1920, c. 115, §2. See also Miss. Laws 1922, c. 159, §2; Miss. Code §§ 1664, 1961 (1942).
[9]Miss. Const. § 166.

incumbent chancellors and circuit judges to revise the practice and procedure in the circuit and chancery courts; and that the circuit judges and chancellors should examine the courthouse and jail and make recommendations in writing to the board of supervisors in reference thereto. For that extra service they were to receive $1,000 per year. So it appears that this statutory rule making power was given to them to justify the extra compensation rather than to fulfill any great need felt by the legislature for such rules.

The commissions of circuit judges and chancellors so authorized drew up a set of rules in 1921. The rules of the chancery courts[10] contained a statement that they were to be obligatory upon every chancellor in the state in accordance with the opinion of the supreme court in *Williams v. State*.[11] However, an examination of the *Williams* case will reveal that the court did not make these specific rules obligatory upon anyone, but simply approved the action of the circuit judge in following Rule 10, which made it obligatory on the trial judge to examine jurors touching their qualifications. In any event, since the authority to make such rules was contained in the act fixing salaries and has never been re-enacted, it would seem to me that under our present laws each chancellor might prescribe his own rules for practice and procedure if he desire to do so.

In 1936 the Chancellors' Association adopted "Uniform Rules of Practice and Procedure" for the chancery courts of Mississippi.[12] These rules are really an enlargement and revision of the rules adopted in 1921. I am informed that they were drafted initially by the late Chancellor A. B. Amis, Sr., and adopted with minor revision. They were intended as a uniform system of procedure to be followed in all chancery courts of the state. However, I know of no law requiring the chancellors to follow these rules. It seems to be a strictly voluntary proposition.

After writing to all of the chancellors in the state asking them to advise me whether or not they followed either one of these sets of rules, I received replies from ten of the fourteen districts. Of the ten districts about which I have information, eight stated that they attempted to follow generally one or the other of these sets of rules. One of the other two chancellors stated that he was not a stickler for rules, but he often referred to the revised rules. The last chancellor stated that the rules had never been followed in his district, but he gave the further information that the code and *Griffith's Chancery Practice* gave all the rules needed.

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[10]Griffith, Mississippi Chancery Practice 827 (1925).

[11]124 Miss. 720, 87 So. 273 (1921).

[12]See 9 Miss. L.J. 31 (1936) or Annotated Rules of the Chancery, Circuit, and Supreme Courts of Mississippi (Fourth Annual Mississippi Law Institute, 1949) for a copy of these rules.

The Rules of 1936

I will attempt to summarize the main features of the rules adopted by the Chancellors' Association in 1936. As I have already indicated, although most of the chancellors follow these rules generally, they are flexible and there is probably considerable variance in the strictness with which they are enforced.

The first five rules are designed to insure common courtesy on the part of spectators and counsel and efficiency on the part of court officials.

Rule 1 provides that all proceedings shall be conducted in an orderly and dignified manner, and that bickering, demonstrations and indecent language are prohibited. The customary phrases shall be used in addressing the court.

Rule 2 requires the presence of the sheriff, clerk, and court reporter at terms of court.

Rule 3 requires the sheriff to keep all rooms used in connection with the court in clean and comfortable condition. Judge Amis used to say that he started whittling on the bench and scattering shavings around the courtroom so that the janitor would have to sweep the floor. That was his unique way of enforcing Rule 3. In most counties, more attention should be given to the requirement of this rule that the sheriff keep the library of the county in good condition. Many of them are kept in such condition as to be of little value to the court or the attorneys.

Rule 4 requires the clerk to keep the current court files and dockets either in the courtroom or in an adjoining room. This rule is for the convenience of everyone concerned in a trial and prevents unnecessary confusion.

Rule 5 requires all officers, witnesses and solicitors to be prompt, but the $25.00 fine specified under the 1921 rules has been eliminated, and the punishment is now left up to the discretion of the chancellor.

Pleading

Rules 6 to 15 are designed to insure orderly pleadings for the benefit of the court and opposing counsel.

Rule 6 requires pleadings to be addressed to the chancery court and not to the chancellor. That is merely a restatement of the requirements contained in Code Section 1283.

Rule 7 requires all papers to be filed with the clerk before presentation except matters which call for an injunction, ne exeat, habeas corpus,

or fiat. It has been the practice in my district for the chancellor himself to mark the papers filed in those cases in which attorneys live some distance from the county involved and there is some urgency in the matter.

Rule 8 requires the papers filed to be endorsed on the back with the style of the case, the nature of the paper, and the name of the solicitor. A number of the districts now use the flat files and this rule is superfluous in such districts.

Rule 9 simply provides that blanks must be filled in or a statement made that the information is unobtainable.

Rule 10 requires the several facts relied on for relief to be set forth in separate paragraphs which shall be numbered, and provides that the defendant shall answer in numerical order. This rule is one that is of considerable benefit to counsel and to the court, and it should be more strictly enforced.

Rule 11 provides that if the defendant obtains additional time in which to plead, causing the case to go over until the next term of court, he may be taxed with the accrued costs. However, most lawyers do not insist on applying this penalty, probably because they have been in the same situation before or expect to be in the future.

Rule 12 provides the same penalty if material amendments are made during the term which require the continuance of the case.

Rule 13 requires that the complainant shall not be delayed by a demurrer, but that the defendant shall file his answer in time for the case to be tried at that term of court. As a matter of practice that is usually arranged by agreement of counsel.

Rule 14 requires that a wife who is a defendant in a divorce case shall file her answer, and do it in good faith, before suit money will be allowed to her. This rule is not very popular with some lawyers, but is one which should be followed in fairness to the husband who usually gets hit in the pocketbook pretty heavily anyway.

Rule 15 requires that motions for security for costs must be filed and presented not later than the second day of the term following service of process. This rule is designed to prevent the use of such motions merely for delaying purposes.

Trials

Rules concerning the trial of cases are designed to supplement the statutes and rules of evidence, to prevent lawyers and witnesses from congesting the courts, and to provide for the orderly presentation of the facts.

Rule 16 provides for the calling of the docket and setting of cases by the chancellor, and for trial in the order in which they are set. Our code provides two different methods which may be used for the keeping of the docket. The old method was to keep separate issue, motion and probate dockets. The other method is to keep a loose leaf docket which is usually divided into litigated matters and probate matters, and in some districts the divorce cases are kept separate. In many districts now the clerks make up mimeographed or printed dockets of the litigated cases and probate matters requiring attention, and the chancellor sets his docket from this list. This method enables each lawyer to have a copy of the docket as it is being called, and is a great convenience to the bar and court. It also provides a very good medium for the chancery clerks to advertise the efficiency of their services.

Rule 17 provides for the dismissal of cases which have been continued for more than two terms unless they are set for trial at that term. When I examine some of the court dockets in this state, I am reminded of my favorite World War II cartoon involving the character "Sad Sack." The first scene shows "Sad Sack" marching by the bulletin board, and just as he gets opposite it he turns to read the orders posted thereon. The second scene, several hours later, shows "Sad Sack" lifting up a number of orders to get to the ones underneath. The last scene shows "Sad Sack" with a flashlight at the bulletin board, and he has finally gotten down to the order posted on the bottom. That order is one signed by General George Washington ordering the troops to assemble in the morning for the crossing of the Delaware. If the courts did not have some rules about dismissing stale cases in this state, we would probably still have cases on the docket involving the ownership of slaves.

Rule 18 provides that if the chancellor has set aside one day of each week for vacation business, such business shall take precedence over all business of any term then in session. This rule is, of course, a great convenience to out of town lawyers.

Rule 19 provides that, in cases in which the rule has been invoked, a party must testify in the interest of his side before calling other witnesses for his side or retire from the court room. This rule is very frequently invoked in cases in which the defendant is put on first as an adverse witness. It prevents the party litigant from putting on all of his corroborative testimony and then tailoring his story to fit. This rule has been interpreted several times by our supreme court. Under their interpretation,[13]

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[13]Wilson v. Peacock, 111 Miss. 116, 71 So. 296 (1916); Kline v. Hazzlerigg, 21 So. 11 (Miss. 1896); Smith v. Team, 16 So. 492 (Miss. 1894); French v. Sale, 63 Miss. 386 (1885).

the party or his counsel must be notified and given an election to testify first or leave the court room, or his constitutional right to prosecute or defend a civil action in person or by counsel[14] is violated. Our court has also held that if there are two or more parties on one side, one cannot be required to retire from the court room while his co-defendant or co-complainant is testifying.[15] As you will note, this holding seems to have been overlooked by the chancellors in drawing up their revised rules.

Rule 20 requires corroborative testimony in uncontested divorce cases and ex parte matters requiring proof, unless it shall appear that no such testimony is available under the circumstances. This rule has been followed in my district in divorce matters for a number of years.

Rule 21 provides that the chancellor may tax the per diem and mileage of cumulative witnesses and witnesses not called to testify against the party who procured their attendance. That rule is seldom invoked but is a protection to both the court and litigants.

Rule 22 provides for the orderly examination of witnesses without interruption and limits such examination to direct, cross, and re-direct examination. However, it provides that on request new matters may be gone into, and as a matter of practice that permission is usually granted.

Rule 23 deals with objections to testimony and provides that objections must be made to the chancellor in specific terms rather than to opposing counsel, and if required, objecting counsel must give his reasons, and opposing counsel must state the purpose of the testimony. It also puts the duty on counsel to call to the chancellor's attention at the conclusion of the testimony any reserved ruling he may have made as to the admissibility of evidence on penalty of losing the benefit of his objection. No exception need be taken to the ruling of the court, but that part of this rule is frequently ignored when counsel wants to make it known to the chancellor that he thinks the chancellor does not know what he is talking about.

Rule 24 puts the duty on the court reporter to note, mark and preserve all exhibits and depositions and to turn them over to the clerk at the conclusion of the trial. In *Jordan v. Mississippi Central Railroad Company*[16] and *Horton v. Misso,*[17] the supreme court invoked their rule requiring clerks to properly include exhibits and depositions in the record and disallowed costs to the clerks involved.

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[14]Miss. Const. § 25.
[15]Bernheim v. Dibrell, 66 Miss. 199, 5 So. 693 (1889).
[16]107 Miss. 323, 65 So. 276 (1914).
[17]157 Miss. 371, 128 So. 103 (1930).

Rule 25 provides in effect that a party calling an adverse witness need not have him summoned but can cross examine him as though he had been called by his own counsel.

Rule 26 provides that only one lawyer to each separate interest may examine any particular witness. It is designed both to save time and to protect the witness, who is the forgotten man in many trials.

Rule 27 prohibits counsel from leading his witness in ex parte matters and uncontested divorce cases.

Rule 28 puts the duty on counsel to talk to their witnesses before the commencement of a trial. However, very frequently in the trial of a case lawyers will ask for a short recess to confer with their witnesses—always stating that they believe they will be able to save the court a lot of time. As a matter of practice that permission is usually granted, even though the chancellor may sometimes suspect that counsel only wants a few minutes to confer with an important client about another matter, or collect a long overdue fee.

Rule 29 provides that oral agreements may be made in the presence of the court and should be noted on the docket or dictated into the record, and provides that all other agreements should be reduced to writing and filed with the papers in the case. It relieves the chancellor of the responsibility of settling any dispute in case that is not done. *Rockett v. Finley*[18] involves this rule, and incidentally is the only one which I have found dealing with the rules adopted in 1936. The supreme court held that court rules are designed to promote rather than to defeat justice and that this rule applied to agreements between lawyers and not between a litigant and a lawyer.

Rule 30 prohibits earwigging the chancellor by lawyers and laymen. Some lawyers have ingenious methods of evading this rule, and it is almost impossible sometimes to prevent ignorant laymen from approaching the chancellor about a particular law suit. Almost every term of court someone attempts to talk to me about their cook who has a divorce case in my court, and how much she has been wronged. They always carefully preface their conversation with the statement that they wouldn't try to influence the court for the world.

Rule 31 puts the duty on counsel to brief or argue the case orally unless such argument is dispensed with by the chancellor. I have found that part of this rule providing that the chancellor may specify the points he desires argued very beneficial and I frequently employ it.

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[18]183 Miss. 308, 184 So. 78 (1938).

Duties of the Chancellor

Rules 32 through 34 define the duties of the chancellor under Code Section 1390 and were no doubt adopted by the chancellors in self-defense. They provide that if a special finding of fact as called for by the code is desired, a request must be made in writing or dictated into the record and called to the attention of the chancellor before he has reached a decision. If any additional finding is requested after the rendition of an opinion, a request therefor must be made in writing before a decree is signed, and such request shall contain no further argument. They provide that the chancellor may not otherwise be required to give an opinion, but he may do so if he desires. Such an opinion, if delivered, will become a part of the record. As a matter of practice, I believe most chancellors get themselves out on a limb and give an opinion. These rules provide further that any suggestion of counsel or request must be made at the conclusion of the opinion, and again that counsel shall not seize on that opportunity to reargue the case. In *Kline v. Sims,*[19] the court held that this opinion is a part of the record on appeal, even though not mentioned in their rules.

Decrees

Rules concerning decrees of the court are designed to serve as a guide for lawyers, and to provide for uniformity and exactness in decrees.

Rule 35 provides for a caption for easy identification.

Rule 36 provides that the decree shall adjudicate such facts as to show that the court had lawful authority to render it, shall dispose of all material matters raised by the pleadings, and that different items of relief granted shall be stated in separately numbered paragraphs. The decree shall be definite and in litigated cases shall tax the costs, and no exception shall be taken to the action of the court, but the losing party is automatically deemed to have excepted.

Rule 37 provides that consent decrees must be okayed by counsel for all interested parties. This, of course, is a protection to everyone concerned.

Rule 38 requires the submission of a decree to opposing counsel in all litigated matters. Of course, as a matter of practice the losing counsel are frequently out with their clients "cussing" the court or explaining why they lost the case, and it is sometimes impracticable to submit the decree for such examination in time to get it on the minutes. In that case I believes the rule would be waived.

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[19]See note 3 *supra.*

Rule 39 provides that decrees should be presented by winning counsel promptly after the rendition of a decision. A really experienced lawyer will usually do that without being required to do so because he is afraid the court might change its mind.

Rule 40 simply provides for the delivery of the decree to the clerk for filing as soon as it has been rendered.

Probate Matters

The rules which deal with the handling of probate matters, are, in my opinion, the most valuable part of these rules. They are designed to prevent neglect of fiduciaries and counsel, to preserve estates and to protect clients, lawyers and clerks.

Rule 41 provides that only licensed attorneys may present papers in probate matters. Once a solicitor has been employed in such a matter he may not be released from such employment or discharged except by the chancellor's consent. This is both a protection to the lawyer and to the court. Frequently persons desiring to lease or buy property of a ward will draw up a petition and present the matter without the knowledge of the guardian's regular solicitor. In my opinion, Rule 41 prohibits this practice. I think, of course, it is in order for the purchaser's attorney to draw or pass on the papers in connection with the guardian's legal counsel and even present them with such counsel's consent.

Rule 42 requires fiduciaries and attorneys to be prompt and diligent in carrying out their duties, and assesses penalities in cases of failure.

Rule 43 requires the clerk to make up a list of probate matters due at any term of court, to notify the parties and solicitors by mail, and to deliver such list to the chancellor on the first day of the term. This rule helps greatly to expedite the probate business of the court.

Rule 44 requires monies to be kept in the bank and securities to be kept in a safety deposit box.

Rule 45 requires that annual accounts shall contain a statement of all the assets then under the control of the fiduciary, and that if any money and securities are kept in a bank a certificate of the bank shall be attached. One of our chancellors has called my attention to a case in which this statement was not required and in which a guardian filed an account for ten years showing a bank balance each year. Such account was made up by his attorney and approved by the court, when he had in fact drawn out all of the funds for his own use shortly after the guardianship was opened and told no one about it. This rule further provides for a statement covering the details of any outstanding loans.

Rule 46 provides that disbursements shall be supported by proper vouchers as required by our code, that the order of the court shall be cited, and that it shall recite that the claim was properly probated if that was required. In this connection I would like to extol the virtues of the flat filing system, even for vouchers. Vouchers can either be attached, two or more, to a regular legal-size sheet of paper, or can be fastened in the file from each end so that the file does not become bulky. One of my clerks now uses red files for vouchers making them much easier to locate.

Rule 47 provides a method for substitution in case of lost vouchers, and for hearing proof in case he is unable to secure a duplicate.

Rule 48 provides that expenses arising after the death of the decedent must be approved by the chancellor before payment, otherwise such payments may be disapproved. As a matter of practice where there is a time factor, counsel sometimes gets oral permission of the chancellor and procures his decree at a later date.

Rule 49 requires that petitions for support allowances for wards shall show the amount on hand, the income, and the amount of any previous allowance. This information is, of course, necessary for the chancellor to intelligently pass on such matters.

Rule 50 requires petitions for investments to show the amount to be invested, the security offered and the value thereof. In case of a loan the due date, the interest rate, and the affidavit of two or more creditable persons as to the value of the property must be attached, or testimony must be offered.

Rule 51 requires petitions for authority to compromise and settle claims for wrongful death or injury to set forth the details of the accident and damages resulting therefrom, and for the production of material witnesses; and if counsel has investigated, he shall testify as to his investigation. It frequently occurs that the attorney representing the defendant or his insurance company will present the petition for authority to compromise. Although this rule may not require such statements, it is certainly good practice for counsel in such cases to make his position known to the chancellor at the beginning of the hearing.

Rules 52 and 53 provide that petitions for commissions and attorneys' fees shall show the amount of the estate handled, the balance on hand, the nature of the services rendered, and any amount that may have been previously allowed. In cases of attorneys, it shall show any agreement touching compensation; and in cases of damages for wrongful death or injury or other claims due the estate, the services rendered and expenses incurred by the attorney shall be shown, and any amount offered in settlement before the attorney was employed. The fee may be fixed by the

chancellor without regard to any previous contract made by unauthorized persons.

Rule 54 provides that accounts and petitions in probate matters shall be sworn to and proof produced if required by the chancellor.

Rule 55 is designed to protect the clerk, and requires the court costs to be paid annually in probate matters. Prior to the adoption of this rule court costs have been known to accrue for a number of years, and over the period of office of several different clerks.

Hearings in Vacation

Rule 56 provides that when a matter is presented in vacation in person or by mail, the chancellor shall be furnished with such preceding papers as are necessary to give him full information in the matter. If it is a matter of the validation of bonds, then a certificate by the clerk that no protest has been filed must be furnished.

Rule 57 requires that the attorney must enclose stamped, addressed envelopes for the return of papers to the clerk. This of course, is a matter of common business courtesy.

Rule 58 provides that no injunction shall be granted without notice except where such notice is impracticable or the matter is urgent.

Rule 59 provides that in case of the removal of disabilities of a resident minor, the minor shall be produced unless specially excused. Except in special cases, disabilities of minors under 16 years will not be removed. I do not know whether that age limit was intended to apply to cases of removal for some special purpose or not. As a matter of practice I do not ordinarily remove disabilities of anyone under 18 years of age; but if a removal for a special purpose is requested, if the facts with reference to the particular transaction are fully presented, I am not too particular about this age requirement.

Duties of the Clerk

Rules dealing with the duties of the clerk are designed for the preservation of and easy access to court files for the benefit of all the interested counsel and parties.

Rules 60 and 61 provide that the clerk shall place the papers in a jacket or separate folder, making notation on his docket, and file each case in numerical order. As I have previously stated, I believe the flat file is much superior to the old jacket method of filing.

Rule 62 provides that the clerk shall not permit anyone other than interested attorneys to take the papers out of his office, and that such at-

torney shall receipt therefor. This rule is an important one although it is often breached. It is a modification of rule 19 of the rules adopted in 1921. In investigating this particular rule, I find that Code Section 1238 absolutely requires leave of the chancellor to withdraw any paper from the clerk, and then a copy must be substituted by the party obtaining such leave. I believe this statutory requirement is generally violated by all the chancery clerks and attorneys in this state, and should be modified. We should give serious consideration to the adoption of the federal rule requiring that extra copies of papers be filed.

Rule 63 requires the clerk to keep original wills and bonds, and disputed documents, in a safe or vault and provides that he shall not release them except on an order of the chancellor entered on the minutes.

Rule 64 requires attorneys to return court files within fifteen days, or in any case before the next term of court. If this rule were strictly observed by attorneys, it would save our chancery clerks many a headache. I know of one clerk, at least, who sends his deputy around to the various law offices at intervals to collect court files. In many cases he would turn up with a good wheelbarrow full.

Rule 65 provides that the clerk shall bind vouchers in numerical order.

Rule 66 provides that the clerk shall require security for costs in case of non-resident or insolvent parties unless a statutory affidavit is made, or the costs prepaid. This rule is, of course, for the protection of the court officials.

I find that Rule 3 of the 1921 Rules and Code Section 1236 both require the clerk to read the minutes of the court for the previous day in open court. This requirement is not included in the 1936 Rules. I know of no district in which this statute is strictly followed. In my opinion it is impractical and should be repealed.

Whether or not the chancellor of your particular district follows these revised rules closely, I believe you will find that if you comply with them, you will greatly speed the administration of substantial justice.

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NOTES

Effect of Mississippi's Wrongful Death Statute on the Cause of Action Saved by the Survival Statutes

Whatever rights may have at one time existed to "wergild" or compensation paid by the slayer to the family or clan of the person slain, it may be stated as a general rule of common law that no action will lie to recover damages for the death of a human being occasioned by the negligence or other wrongful act of another.[1]

The rule seemingly originated in 1808 when Lord Ellenborough held without citing any authority that a husband had no action for loss of his wife's services through her death, and declared in broad terms that, "in a civil court the death of a human being could not be complained of as an injury."[2] The decision was accepted and followed, not without dissent, in England,[3] and notwithstanding a good start to the contrary,[4] in the United States.[5] The injustice of this rule is quite pointedly revealed by a statement of Calhoon, J. in *Illinois Central Railroad v. Johnson.*[6]

> By the wisdom of the common law, so profound as to be quite undiscernible, if a man was hurt by the negligence of another he might sue for damages, but if he were killed by the negligence, neither his heirs nor his executor or administrator could sue at all, thus making it much cheaper to kill him than to hurt him.

The harshness of this doctrine was somewhat alleviated by statutes in England and subsequently in all of the states of the United States called "survival" acts.[7] These statutes provide that certain types of personal actions shall not abate on the death of the wronged person but shall survive him. Likewise they provide that on the death of a party who has

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[1]16 Am. Jur. 35; Gulf. M. & N.R.R. v. Simmons, 144 Miss. 350, 109 So. 857 (1926); Kirkpatrick v. Ferguson-Palmer Co., 116 Miss. 874, 77 So. 803 (1918). The Supreme Cour of the United States said in 1877: "The authorities are so numerous and so uniform to the proposition that, by the common law, no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question." Mobile Life Ins. Co. v. Brame, 95 U.S. 754, 758 (1877).

[2]Baker v. Bolton, 1 Camp. 493, 495, 170 Eng. Rep. 88, 91 (1808).

[3]Osborn v. Gillet, L.R. 8 Ex. 88 (1873); Clark v. London Gen. Omnibus Co., [1906] 2 K.B. 648; Admiralty Comm'rs v. S.S. Amerika, [1917] A.C. 38.

[4]Cross v. Guthery, 2 Root 10, 1 Am. Dec. 61 (Conn. 1794); Shields v. Yonge, 15 Ga. 349, 60 Am. Dec. 698 (1854); Ford v. Monroe, 30 Wend. 210 (N.Y. 1838). See Signor, *Action for Death by Wrongful Act at Common Law and Under the New York Statute,* 67 Albany L.J. 133 (1905).

[5]The Harrisburgh, 119 U.S. 199 (1886); Mobile Life Ins. Co. v. Brame, *supra* note 1.

[6]77 Miss. 727, 730, 28 So. 753, 755 (1900).

[7]Tiffany, Death by Wrongful Act §§ 19, 23 (2d ed. 1913).

commenced an action but dies before judgment his personal representative may revive the action. The survival statutes in Mississippi are as follows: Mississippi Code Section 609 provides:

> Executors, administrators, and temporary administrators may commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted, . . .

Section 611 provides:

> When either of the parties to any personal action shall die before final judgment, the executor or administrator of such deceased party may prosecute or defend such action, and the court shall render judgment for or against the executor or administrator . . .

These statutes authorize the personal representative to institute[8] or revive[9] a suit brought against the tort feasor for personal injuries.

The survival statutes, however still left the bereaved family of the victim without a remedy. This was remedied in England by Lord Campbell's Act of 1846.[10] The name of the act has become a generic term for similar statutes enacted later in the United States. Every American state now has a statutory remedy for wrongful death.[11] Most of the statutes were modeled upon Lord Campbell's Act, which creates a remedy for the death in favor of the decedent's personal representative for the benefit of certain designated persons. A few states, however, merely have survival acts, which proceed upon the theory of preserving the cause of action vested in the decedent at the moment of the wrong and enlarging it to include the damages resulting from the death.[12]

This statutory modification of the common law rule first appeared in the Code of 1857.[13] Patterned on Lord Campbell's Act, it has undergone a series of amendments. Its provisions relevant to the existence of a remedy surviving after the death of a person are in the first sentence of the statute:

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[8]Vicksburg & M.R.R. v. Phillips, 64 Miss. 693, 2 So. 537 (1887).
[9]Hamel v. Southern R.R., 108 Miss. 172, 66 So. 426 (1914), *suggestion of error overruled,* 108 Miss. 172, 66 So. 806 (1915).
[10]Statute, 9 & 10 Vict., c. 93 (1846).
[11]Tiffany, *op. cit. supra* note 7, §§ 19, 24.
[12]*Id.* §19.
[13]Miss. Code, c. 54 (1857); Miss. Code § 1453 (1942).

> Whenever the death of any person shall be caused by any real wrongful or negligent act, or omission, or by such unsafe machinery, way or appliances as would, if death had not ensued, have entitled the party injured, or damaged thereby to maintain an action and recover damages in respect thereof, . . . , the person or corporation, or both, that would have been liable if death had not ensued, and the representative of such person shall be liable for damages, notwithstanding the death. . . .

The Problem

In every instance the survival statutes were in existence at the time of passage of the death acts. Since the statutes apparently were applicable to the same situation, the tortious conduct of one person resulting in the death of another, the state courts soon found it necessary to consider what effect the death statute was to have on the survival statutes. The specific problem was whether the causes of action granted under the legislation merged or were mutually exclusive of one another. Th statutes of many states, although not identical, are fundamentally alike. They all found their origin in Lord Campbell's Act.

The Mississippi court, along with many other state courts,[14] has interpreted the death statute as creating an independent cause of action. The supreme court stated in 1887: "The cause of action givn is entirely distinct from the survival statutes . . ."[15] and in 1944: ". . .. the statute . . . is not a statute of survival but creates a new and independent cause of action."[16]

The result of interpreting the statute as creating an independent cause of action would seem to be that two causes of action exist, the one for personal injury which survives to the personal representative, and the struction is strictly adhered to, the death becomes the basis of the action other an independent cause arising under the death statute. If this conrather than the injury. Satisfaction of a claim for personal injuries, whether by judgment, settlement, or dismissal upon the merits, would never create a bar to an action for wrongful death ultimately resulting from the same injury, regardless of the length of the period between the injury and the

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[14]The following states apparently adhere to the new cause of action theory: Arkansas, California, Georgia, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Virginia, Washington, and Wisconsin. See 16 Am. Jur. 48.

[15]Vicksburg & M.R.R. v. Phillips, 64 Miss. 693, 694, 2 So. 537, 539 (1887).

[16]Hasson Grocery Co. v. Cook, 196 Miss. 452, 17 So.2d 791 (1944). The Fifth Federal Circuit Court of Appeals is in accord saying in Thames v. Mississippi, 117 F.2d 949, 951 (1941), that "the act . . . does not cause to survive or be revived the deceased's cause of action but enables designated beneficiaries to recover. . . ."

death. Such a construction may leave the wrongdoer twice liable for the same elements of damage, and leave him subject to suit when the injured party eventually dies. A condition to the later action would be proof that the death was a result of the injury.

The Mississippi court, while interpreting the statute as creating a new cause of action, has avoided such unjust results by construing the provision in the death statute, that the action may be maintained for damages where the injury was such that the injured person might have maintained an action therefor had he lived, as not only referring to the character of the injury, but also as constituting a condition to the right of action given by it.[17] This has the effect of making a recovery in a suit under the survival statutes a bar to a subsequent action under the death act, since the recovery extinguishes the right to bring an action.

However, in *Hamel v. Southern Railroad Company*[18] the wife, as administrator, had revived a suit after the death of her husband which he had brought for personal injuries, and recovered. She later brought an action under the death statute and the defendant pleaded that the first judgment was res judicata. Although the court held that the wife could maintain an action under the death statute, she could not, under the provision which entitled her to damages of every kind,[19] recover for any element of damage allowed in the former suit. If the court had followed literally its earlier interpretation, recovery under the death statute would have included all items of damage.

In *Edward Hines Yellow Pine Trustees v. Stewart*[20] the facts were practically the same as in the *Hamel* case. The court held the former judgment to be a bar to the action under the death statute, thus in effect holding the cause of action to be the injury and rebutting clearly any theory of a separate cause of action arising under the death act. This case had the effect of overruling the *Hamel case.* The court explained its action be referring to an amendment[21] which gave the personal representative the right to sue under the death act, a right which did not exist under the statute prior to that time.[22] The court said the the *Hamel* decision was based on the exclusion of the personal representative from the right to

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[17]Hasson Grocery Co. v. Cook, *supra* note 16; Payne v. Moore, 126 Miss. 693, 89 So. 225 (1921); Kirkpatrick v. Ferguson-Palmer Co., *supra* note 1; White v. L.N.O. & T. Ry., 72 Miss. 12, 16 So. 248 (1906).

[18]See note 9 *supra.*

[19]For an excellent treatment of damages recoverable under this provision see Note, *Damages Under the Mississippi Wrongful Death Statute,* 13 Miss. L.J. 571 (1941).

[20]135 Miss. 331, 100 So. 12 (1924).

[21]Miss. Laws 1914, c. 214.

[22]Miss. Code § 663 (1906).

bring the action under the death statute, holding that as the statute now allowed the personal representative to bring suit, he could amend his declaration under the survival statute and recover for the wrongful death. In a vigorous and well reasoned dissent, it was pointed out that if the exclusion of the personal representative was the basis of the *Hamel* decision the court in that case failed to so state. It will suffice to consider the case here only in respect to the support it gives to the contention that, although the Mississippi court states that the death act gives an independent cause of action, it does not so hold.

Again, in the *Hamel* case,[23] the court said.

> It seems clear that under our statute no suit could have been maintained by the widow had the deceased settled his claim for damages in his lifetime nor could this suit be maintained if the record showed that the suit brought by the deceased had been prosecuted to final judgment by the deceased. The reason for this conclusion is written into the statute itself. If the deceased had released the railway company in his lifetime, or if he had prosecuted his suit to final judgment before his death, he would not have been entitled "to maintain an action and recover in respect thereof" nor would his next of kin have had a right of action under such circumstances because the right of the decedent to maintain the action is made a condition precedent for that given by the statute to the next of kin.

This would not be so if the death statute in fact created a new, independent cause of action. Yet in the *Hasson* case, seventeen years later, it was still vigorously asserted that the death statute creates a new cause of action.[24] That case stands for the proposition that an action *ex contractu* does not lie under the death act, and it has no direct bearing to the matter under discussion.

It would seem necessary to limit the court's language in these cases to its actual holding on the specific point involved. The doctrine that the death statute creates an independent cause of action is apparently based upon a confusion of the cause of action for the injury with the remedy for its enforcement. The better rule may be that the basis of the cause of action under both the survival statutes and the death act is the injury to the person of the deceased, for which coexistent remedies are given.

The question whether one or more actions are maintainable for an injury to the person resulting in his death suggests the need of construing

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[23]Hamel v. Southern R.R., 108 Miss. 172, 176, 66 So. 426, 429 (1914).
[24]See note 16 *supra*.

these statutes with reference to the reasonable and natural purpose sought to be attained by them. This is preferable to a test based upon refinement of reasoning as to whether the act created a new action which coexists with the action surviving death or whether one suit is exclusive. The apparent purpose of the death act was to permit the claim of the injured person to abate with his death, and to substitute in place of this a remedy for the benefit of certain designated beneficiaries who were injured by the death of the decedent.

The language of the first section of the death act, giving an action for damages "notwithstanding the death" of the injured person, indicates that the lawmaking power intended to preserve an existing cause of action, even though death had defeated all prior remedy. The cause of action was preserved but a new and distinct remedy was creatd to secure redress for the injury. The very use of the phrase that the action may be brought "notwithstanding the death" makes it clear that the action given the statutory beneficiaries was intented as a substitue for the action which had vested in the decedent. If the action had been a distinct suit for death, such language would have been entirely unnecessary and superfluous. Its uses indicates that the lawmaking power still had the primary action in mind, and intended in substitution for it to give a right of recovery for the benefit of designated beneficiaries. Moreover this phrase, "notwithstanding the death," is very unsatisfactory language to use in creating a new cause of action, since upon the theory that the statute creates a new cause of action the action would lie because of the death, not in spite of it. The necessary conclusion is that no new cause of action is created, especially in view of the fact that it is not declared anywhere within the statute that an action brought under it is one *for the death* of injured party.

Other States

As has been pointed out, a death statute or a provision added to the survival statute allows an action for damages for wrongful death in every state. All of these statutes are modeled on Lord Campbell's Act if they are independent death statutes. The majority of the state courts subscribe to the new cause of action theory.[25] Of these, comparatively few hold the new cause of action to be substantially independent. They are courts which hold that a recovery or release by the deceased does not bar an action for the death, by or for the dependents.[26]

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[25]See note 14 *supra.*

[26]Blackwell v. American Film Co., 189 Calif. 689, 209 Pac. 999 (1922); Denver R.R. v. Frederick, 57 Colo. 90, 140 Pac. 197 (1914); Railway Co. v. Van Alstine, 77 Ohio St. 395, 83 N.E. 601 (1908); Rowe v. Richiards, 35 S.D. 1, 150 N.W. 301 (1914); Milwaukee Coke Co. v. Industrial Comm'n, 160 Wis. 247, 151 N.W. 245 (1915).

A number of courts construe the death act provision, that the action may be maintained for damages where injury was such that the injured person might have maintained an action for it had he lived, as constituting a condition which not only refers to the character of the injury, but also to the right of action given.[27] Without an extensive examination of the statutes and the cases in other states, it is believed that they are open to criticism insofar as they hold the death act to create a new cause of action.

Conclusions

Mississippi escapes the undesirable result of making the tort feasor continually subject to suit by the beneficiaries upon the death of an injured party who has already recovered for his injuries. It does this by construing the provision that the injury must be such as would have entitled the injured party to bring an action for damages as referring not only to the character of the injury, but also as constituting a condition to the right of action given. Thus when the original claim of the injured party is satisfied by judgment or settlement, the cause of action is extinguished and the condition precedent to suit by the statutory beneficiary cannot be fulfilled. Likewise, by authorty of the *Hines* case,[28] a recovery under the survival statutes is a bar to a later suit under the death statute. This seems to be judicial interpretation unwarranted by the death act. There is no indication that this provision was intended to refer to any more than the character of the injury. Under the suggested theory that there is but one cause of action with coexistent remedies, it is not necessary to invoke the condition referred to in order to make payment to the injured party a defense to the claim of the statutory beneficiaries. That result would follow from the extinguishment of the single cause of action. As pointed out, any other result would work an injustice to the wrongdoer. However, a different case arises where the party dies prior to the action or during an action which he brings. In that case the remedy under the death statute becomes immediately available. By the coexistent remedy theory, recovery under the survival acts would not be a bar to an action under the death statute and the harsh result of the *Hines* case could be avoided.

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[27]Munro v. Pacific Coast Dredging & Reclamation Co., 84 Calif. 515, 24 Pac. 303 (1899); Kling v. Torello, 87 Conn. 301, 87 Atl. 987 (1913); Collins v. Hall, 117 Fla. 282, 157 So. 646 (1934); State *use of* Melitch v. United Ry. & Elec. Co., 121 Md. 457, 88 Atl. 229 (1913); Killiher v. New York C. & H.R.R., 212 N.Y. 207, 105 N.E. 823 (1914); Piukkula v. Pillsbury Mills, 150 Ore. 304, 42 P.2d 921 (1935); McCafferty v. Pennsylvania R.R., 193 Pa. 339, 44 Atl. 435 (1899); Thompson v. Ft. Worth & R.G.R.R., 97 Tex. 590, 80 S.W. 990 (1904); Brown v. Chicago & N.W.R.R., 102 Wis. 137, 77 N.W. 748 (1898).

[28]See note 20 *supra*.

The doctrine that the cause of action remains the same, and the effect of a death statute is merely to give a new remedy has much to commend it. It is in harmony with the express terms of both the survival and death statutes, requiring no strained construction of either. And it results in a judicial solution fair to the wrongdoer, the injured person, and his statutory beneficiaries.

Fred A. Carver

RECENT DECISIONS

Administrative Law—Agency Discretion in Interpreting and Administering Licensing Statute

A statute licensing practice of veterinary medicine[1] provided that "All persons who are not already licensed to practice veterinary . . . prior to the passage of this act shall be required to take an examination. . . . Provided, however, that any person who has practiced veterinary medicine . . . for a period of ten years prior to the passage of this act shall be granted a license upon his application therefor and upon satisfactory evidence furnished the board as to such practice, and of his good moral character. . . ."[2] This act repealed a prior statute[3] which had made it a misdemeanor to practice veterinary medicine without a license. Petitioner produced evidence of ten years' prior practice in this state, but without a license, and evidence of his good moral character. The board refused the permit on the ground that the ten years' earlier practice had been "unlawful." Held: The board had no discretion under the statute to refuse to grant the license on that basis. *Mississippi State Board of Veterinary Examiners v. Watkins,* 40 So.2d 153 (Miss. 1949).

Several questions are brought to mind by this novel case: (1) How many classes of applicants does the act create? (2) Under such a licensing act does a reference to prior practice mean "prior lawful practice?" (3) Did the Board have discretionary power to determine whether an applicant came within the proviso of the act? (4) On judicial review, was the board's decision on the facts supported by substantial evidence, or was it clearly arbitrary?

The most logical interpretation is that the act created three classes: (1) those who were already licensed under state law; (2) those who successfully passed an examination by the board; and (3) those who had practiced veterinary medicine in Mississippi for ten years prior to the passage of the act, who were of good moral character. It seems clear that the legislature did not intend to require that those who had practiced ten years must also produce a license. If this had been the legislative intent, the proviso, which gives rise to the third class above, would have been unnecessary and meaningless. Authority would seem to substantiate this interpretation.[4] This literal interpretation removes the necessity for answering the second question posed. But it should be noted that some courts have read the word "lawful" into similar acts.[5] However, there is strong authority for a contrary view,[6] which places a premium upon violation of the law.[7]

The third, and more important question, involves the discretionary power of the board to determine whether an applicant comes within the proviso. Before the board could deny the license two prerequisites were necessary: a finding by the board as a matter of fact that the prior practice was unlawful; and, a finding that the act pro-

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[1]Miss. Code § 8914-01 *et seq.* (1942).

[2]Miss. Code § 8914-06 (1942).

[3]Miss. Code § 8914 *et seq.* (1942).

[4]"A statute should not receive such a construction as would render any of its provisions vain and useless." McKenzie v. Boykin, 111 Miss. 56, 71 So. 382 (1916); Martin v. O'Brien, 34 Miss. 21 (1857); Swann v. Buck, 40 Miss. 268 (1866); Adams v. Yazoo & M.V.R.R., 75 Miss. 275, 22 So. 824 (1897).

[5]State v. Ohio State Medical Board, 60 Ohio 21, 53 N.E. 298 (1899); State v. Board of Dental Examiners, 31 Wash. 492, 72 Pac. 110 (1903).

[6]*In re* Christensen, 59 Wash. 314, 109 Pac. 1040 (1910).

[7]If a person had been violating the prior statute for a period of only five years, he had to take the examination; but if he had been violating the prior act for ten years or more, he was exempted from examination.

hibited that type of applicant. As to the former the court probably did not mean that the board had no discretion. It meant only, that as to the latter there was no discretion, for this falls within the sphere of interpretation. Undeniably, statutory interpretation is a matter of law, and, as such, is reserved for final determination by the courts.[8] There is, however, a tendency to recognize statutory interpretation by boards.[9] In at least one case a board interpretation has been held conclusive.[10]

This brings forth the final question: was the board's determination supported by substantial evidence,[11] so as not to be subject to change on judicial review? The usual rule is that determinations by administrative bodies, if supported by substantial evidence, are conclusive.[12] In other words, the function of the court is not to pass on the weight of the evidence, but to decide whether there is substantial evidence to support the board's finding or determination. The finding of fact was not disturbed by the court in the instant case. It merely separated the two functions of fact-finding and interpretation. Evidence supported the finding of fact. Error lay in the abuse of power through interpretation.

In the future, under a line of decisions such as the *Hearst Publications* case,[13] it may be that statutory interpretation by licensing boards will be given increased effectiveness, or even be held conclusive, where it has a reasonable basis in law.[14]

Jase O. Norsworthy

Administrative Law—Appeal from Legislative Function of County Board of Supervisors

Appellees, holders of permits to sell beer and wine, appealed to the circuit court from a legislative "order" of a county board of supervisors prohibiting the sale of beer or wine between the hours of 9:00 P.M. and 7:00 A.M. and all day on Sunday.[1]

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[8]State v. Grenada Cotton Compress Co., 123 Miss. 191, 85 So. 137 (1920); State v. Wheatley, 113 Miss. 555, 74 So. 427 (1917).

[9]Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143 (1946); National Labor Relations Board v. Atkins, 331 U.S. 398 (1947), where the court upheld the NLRB's construction of "economic and statutory" over a possible common law construction.

[10]NLRB v. Hearst Publications, 322 U.S. 111 (1944), where board's interpretation and application of term "employees" was held conclusive on court.

[11]Magee Truck Lines v. Bond, 190 Miss. 426, 200 So. 586 (1941), where the court held that it was not authorized "to substitute its judgment for that of the commission where there is substantial (that is, more than a scintilla of) evidence to support the finding. . . ." See Tri-State Transit Company of Louisiana v. Gulf Transport Co., 201 Miss. 744, 29 So.2d 825 (1947), and cases cited therein.

[12]See Justice Brandies' dissent in Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920).

[13]NLRB v. Hearst Publications, 322 U.S. 111 (1944).

[14]*Ibid.*

[1]Miss. Code § 10224 (1942) provides: "Municipalities may enforce such proper rules and regulations for fixing zones and territories, prescribing hours of opening and closing, and for such other measures as will promote public health, morals, and safety, as they may by ordinance provide, and the board of supervisors of any county may make such rules and regulations as to territory outside of municipalities as are therein provided for municipalities."

The appeal was under a statute[2] which provided for appeal from a "judgment or decision" of a county board of supervisors. HELD: The board exercised a legislative rather than a judicial power, but an appeal from the "order"[3] existed nonetheless.[4] The rule was held valid with the review limited to ascertaining whether or not the board's action was arbitrary, beyond its power to make, or violated any constitutional right. *Board of Supervisors of Clay County v. McCormick,* 42 So.2d 177 (Miss. 1949).

In the federal courts it is well settled that a statute, which provides for review of legislative action of an administrative agency wherein a constitutional court is to review the entire record and evidence and is to make the order or decree which the agency should have made, is an attempt to confer legislative powers on the judiciary and is hence violative of the constitutional provision of separation of powers.[5] But statutes which confer a power to review non-judicial functions of an administrative agency have been held, in both federal and state courts, not to be invalid where the reviewing power is limited to questions of law which are the appropriate subject of judicial determination, such as whether the agency has exceeded its authority,[6] has acted arbitrarily,[7] or has violated any constitutional right.[8]

The Mississippi court has recognized the principle of these cases in sustaining the validity of a statute providing for appeal from an administrative rule when the court's review is limited to either approving or disapproving the action of the agency.[9] The instant case, in extending the scope of Section 1195 to allow a limited direct review of legislative functions of boards of supervisors, merely follows the same principle.[10]

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[2]MISS. CODE § 1195 (1942); "Any person aggrieved by a judgment or decision of the board of supervisors . . . may appeal . . . and may embody the facts, judgment and decision in a bill of exceptions . . . to the circuit court . . . and the court shall hear and determine the same on the case as presented by the bill of exceptions as an appellate court, and shall affirm or reverse the judgment; and if the judgment be reversed, the circuit court shall render such judgment as the board or municipal authorities should have rendered, . . ."

[3]In federal administrative law this would be called a rule rather than an order. Federal Administrative Procedure Act, 60 STAT. 234, 5 U.S.C. 1001 (1946).

[4]Modifying Board of Sup'rs., De Soto County v. Pidgeon-Thomas Iron Co., 114 Miss. 274, 75 So. 117 (1917).

[5]42 AM. JUR., PUBLIC ADMINISTRATIVE LAW § 191; Federal Radio Commission v. Nelson Bros. Bond & Mort. Co., 289 U.S. 266 (1933); Keller v. Potomac Elec. Power Co., 261 U.S. 428 (1923).

[6]Public Service Commission v. Havemeyer, 296 U.S. 506 (1936); *In re* Fredericks, 285 Mich. 262, 280 N.W. 464 (1938).

[7]Federal Radio Commission v. Nelson Bros. Bond & Mort. Co., *supra* note 5; Ma-King Products Co. v. Blair, 271 U.S. 479 (1926); Public Service Commission v. Havemeyer, *supra* note 6; *In re* Determination of Relative Water Rights of Deschutes River, 165 Ore. 435, 108 P.2d 276 (1940).

[8]Pacific Telephone & Telegraph Co. v. Eschleman, 166 Cal. 640, 137 Pac. 1119 (1913).

[9]Dixie Greyhound Lines, Inc. v. Public Service Commission, 190 Miss. 704, 200 So. 579, 1 So.2d 489 (1941). In Calif. Co. v. State Oil & Gas Bd., 200 Miss. 824, 27 So.2d 542, 28 So. So.2d 120 (1946) the appeal was from decision of State Oil & Gas Board which granted exception to oil well spacing rule. Statute provided for appeal to circuit court, that matter should be tried de novo by the court, with authority to approve or disapprove the action of board. Court held that when the appeal was from a rule the provision as to trial de novo would have to be ignored in order to keep the statute from being unconstitutional.

[10]It should be noted that § 1195 empowers the circuit court to render such judgment as "the board or municipal authorities ought to have rendered." It would follow logically from the *Calif. Co.* case, *supra* note 9, that this part of the statute would not be applicable when the appeal is from a legislative rule as here.

In the *Pidgeon-Thomas* case[11] the court apparently felt that to allow an appeal under the statute from a non-judicial act would be conferring legislative powers on the courts, the opinion indicating that the only remedy was by collaterial attack on the board's rule.[12] The instant case is the first time the exact question has been presented to the court since that time, but a foundation for this decision was laid by several cases[13] in which the right to appeal was not challenged, the court in one case indicating that the function performed was legislative in its nature and the scope of the court's review therefore limited.[14]

It might be argued that the need for a direct appeal from a rule of a board of supervisors is slight in that such body resembles a legislature more than it resembles the ordinary administrative agency, being a representative body, subject to direct political control rather than an appointed body of specialists.[15] The availability of the injunction to prevent the enforcement of a manifestly unconstitutional rule lends weight to this reasoning.

But the fact that the power of a board to act in a legislative capacity is a delegated power and exists in only specific situations should warrant the opinion that some direct check on the authority of the board and the constitutionality of its acts should be provided. In such case, the presence of an adequate remedy at law would defer injunctive relief, and some degree of uniformity of judicial review thereby effected.[16] This view is made stronger by the fact that a review by certiorari of the proceedings of an agency which has acted in a non-judicial capacity is not available.[17]

Francis B. Stevens

Administrative Law—Probable Cause As Prerequisite to Enforcement of Agency Order to Make Report

Plaintiff, having complied with a court order to produce records, challenged the power of the Federal Trade Commission to require further reports to show con-

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[11]See note 4 *supra*.

[12]*Ibid.* Appeal under § 1195 from decision of board of supervisors refusing to transfer ad valorem road fund to the district road bond fund for payment of work done in constructing roads. Court held the refusal to be an administrative act from which an appeal would not lie, the only remedy being by mandamus, injunction or prohibition.

[13]Bd. of Sup'rs. of Tishomingo County v. Blissett, 200 Miss. 645, 27 So.2d 678 (1946); Green v. Alcorn County, 192 Miss. 468, 6 So.2d 130 (1932); Calif. Co. v. State Oil & Gas Bd., *supra* note 9.

[14]Bd. of Sup'rs. of Tishomingo County v. Blissett, *supra* note 12. Board sustained petition to lay out new road. Objectors appealed under § 1195. In sustaining action of the board the court said: "Whether the public interest or convenience requires the road to be laid out . . . is an administrative problem, legislative in its nature. . . . The province of a judicial review . . . must have its limitation in the inquiry whether in the situation in hand there was any reasonable basis for the action of the board, and unless it can be said that manifestly no such basis exists, the courts have no business in the matter."

[15]Rep. Att'y. Gen. Comm. Ad. Proc. 101 (1941).

[16]For the need for uniformity of judicial review of administrative action see Davis, *Forms of Proceedings For Judicial Review of Administrative Action*, 44 Ill. L. Rev. 565 (1949).

[17]Anderson v. Franklin County School Bd., 164 Miss. 646, 146 So. 134 (1933); Ill. Cent. R.R. v. Miss. R.R. Commission, 143 Miss. 805, 109 So. 868 (1926); Cumberland Tel. & Tel. Co. v. State, 135 Miss. 835, 100 So. 378 (1924); Forrest County v. Melton, 123 Miss. 615, 86 So. 369 (1920).

tinuing compliance. HELD: The Commission may execise powers of original inquiry. No probable cause for belief that the law has been violated need be shown in a proceeding to enforce the order to make the report. *United States v. Morton Salt Company,* 70 Sup. Ct. 357 (U.S. 1950).

The sweeping terms of the decision in the instant case mark the climax to a trend in recent decisions involving the requirement for showing probable cause in enforcement proceedings for agency subpoenas. The shift in opinion evidenced by the trend is a result of the rapid growth that has characterized the development of the entire body of our public administrative law.

As recently as 1924, when the FTC sought information about statutory violations without showing probable cause, the court said, "It is contrary to the first principles of justice to allow a search through all the respondent's records, relevant and irrelevant, in the hope that something will turn up."[1] Twelve years later the attitude of the court was much the same.[2]

The tenor of these decisions followed the narrow confines within which our courts had held all administrative investigatory activities. The scope of the investigative power itself, once strictly limited to adjudication and law enforcement,[3] only in recent years has been extended as an aid to rule making,[4] licensing,[5] prosecuting, supervising and directing,[6] general policy determination,[7] and now to "fishing expeditions."[8]

Orders for the production of books and papers which only a few years ago were thought to be violative of constitutional mandates against unreasonable searches and seizures[9] are no longer held to be so restricted.[10] Indeed, today the Fourth Amendment does not restrict the use of administrative subjoenas except as to restrictions on scope and relevancy.[11] The requirement that agencies must show probable cause that the law has been violated in judicial proceedings to enforce subpoenas has likewise waivered and fallen.

The first inroads were made when courts, sensing the need for permitting agencies to more freely secure information needed for carrying out the programs

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[1]FTC v. American Tobacco Co., 264 U.S. 298 (1924). This case gave birth to the oft quoted slogan "no fishing expeditions."

[2]Jones v. SEC, 298 U.S. 1 (1936).

[3]Harriman v. ICC, 211 U.S. 407 (1908). Here the ICC could investigate only on report of a complaint. See also FTC v. Baltimore Grain Co., 267 U.S. 586 (1924). For an exhaustive survey of the history of administrative investigative activities see Davis, *The Administrative Power of Investigation,* 56 YALE L.J. 111 (1947).

[4]Stahlman v. FCC, 126 F.2d 124 (D.C. Cir. 1942).

[5]National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[6]The Federal Reserve Board and the FDIC supervise the nation's banking through investigation.

[7]12 FCC Ann. Rep. 10 (1946) ; 7 FCC Ann. Rep. 10 (1941).

[8]United States v. Morton Salt Co., 70 Sup. Ct. 357 (U.S. 1950).

[9]Boyd v. United States, 116 U.S. 616 (1885). In dicta, the court extended the search provisions of the Fourth Amendment to limit the use of subpoenas.

[10]In Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), the court observed that a subpoena duces tecum simply does not involve a question of actual search and seizure.

[11]The constitutional requirement of reasonableness, including particularly in describing the place to be searched and the person or things to be seized is met, in agency subponas, by a specification of the documents to be produced, adequate, but not exclusive for the purpose of relevant inquiry. Oklahoma Press Publishing Co. v. Walling, *supra* note 10.

they administer, approved investigations without probable cause into businesses "affected with the public interest."[12] This formula proved unsatisfactory and was rejected as obsolete.[13]

A somewhat broader and more definite standard was developed by the federal courts in a series of decisions under the Emergency Price Control Act.[14] If records were required by statute to be kept, then they were "quasi public," and could be examined without a showing of probable cause. These distinctions between quasi-public and other records have been ignored in later cases.[15]

In the *Oklahoma Press Company* case[16] the court said that the Fair Labor Standards Administrator, in performing his investigatory functions, "must not be limited by forecasts of the probable result of the investigation." The constitutional requirements of "probable cause supported by oath or affirmation" is satisfied, in the case of an agency subpoena *duces tecum,* by the court's determination that the investigation is for a purpose Congress can order, that it is in fact authorized by Congress, and that the documents sought are relevant to the inquiry.[17]

In the face of this language, it was not at all difficult for the court in the instant case to permit the FTC to investigate on mere suspicion. The court said that the function of a federal agency in exercising its investigatory power is not judicial in character, but legislative, and is thus not subject to the narrower restrictions which are placed on judicial acts. Moreover, the nature of these agency investigations bears a close similiarity to grand jury investigations[18] and thus require no case or controversy in order to get evidence. The agency can investigate merely on suspicion that the law is being violated, or simply because it wants assurance that it is not.

It is therefore apparent that as federal regulation has expanded and intensified, the administrative quest for information and facts has pushed aside once firmly rooted constitutional principles concerning privacy, searches and seizures, and freedom from governmental snooping. With a delegation of broad investigatory power from the Congress,[19] a federal agency is free to probe at will into businesses which operate within the field of the agency's administrative activities without regard for the existance of probable cause to believe that the law is being violated.

Norman Gillis, Jr.

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[12]FTC v. American Tobacco Co., *supra* note 1; Troy Laundry Co. v. Wirtz, 155 F.2d 53 (9th Cir. 1946), *cert. denied,* 329 U.S. 723 (1946).

[13]Olsen v. Nebraska, 313 U.S. 236 (1941).

[14]Hagen v. Porter, 156 F.2d 362 (9th Cir. 1946); Bowles v. Insel, 148 F.2d 91 (3d Cir. 1945); Bowles v. Beatrice Creamery Co., 146 F.2d 744 (10th Cir. 1944).

[15]See note 10 *supra.*

[16]See note 10 *supra.*

[17]The court had previously denied certiorari on a similar view. Montgomery Ward v. Fleming, 114 F.2d 384 (7th Cir. 1940), *cert. denied,* 311 U.S. 690 (1940).

[18]The limits on the grand jury type of investigation are simply that the act shall not be arbitrary or in excess of statutory authority. Oklahoma Press Publishing Co. v. Walling, *supra* note 10. The grand jury analogy is not original here. Consolidated Mines v. SEC, 97 F.2d 704 (9th Cir. 1938); Blair v. United States, 250 U.S. 273 (1918).

[19]Extremely broad grants of power will seldom be found to be lacking. This is probably due to the narrow construction which the courts until recently have insisted in placing on the investigative power. See 38 STAT. 721 (1914), 15 U.S.C. § 46a & b (1940); 38 STAT. 722 (1914), 15 U.S.C. § 49 (1940); 48 STAT. 889 (1934), 15 U.S.C. § 78u (1940); 49 STAT. 831 (1935), 15 U.S.C. § 79r (1940); 52 STAT. 828 (1938), 15 U.S.C. § 717m (1940).

Constitutional Law—Constitutionality of Ticket Scalpers Statute

Defendant who was not a ticket broker was convicted of violating an Indiana statute[1] by selling tickets to a state basketball tournament at a price in excess of that printed on the face of the ticket. Defendant challenges the constitutionality of the statute. Held: The statute is violative of the Indiana constitution.[2] *Kirtley v. State,* 84 N.E.2d. 712 (Ind. 1949).

It is unquestioned that a state may, under its police power, fix the prices of certain commodities.[3] Thus, a state may regulate the price to be charged for storing grain,[4] charges of employment agents,[5] prices of cleaning, dyeing, pressing, and laundry industries,[6] maximum charges for handling and selling leaf tobacco,[7] and the price to be charged for milk.[8]

Courts have refused, however, to recognize that a state under its police power may regulate the price to be charged for admission to theaters, circuses, games and other places of amusement.[9] In the *Tyson* case[10] a statute prohibited the sale of theater tickets at a price in excess of fifty cents over the price which was printed on the face of the ticket. Plaintiff, who was a ticket broker doing a large amount of business in New York, contested the validity of the statute. The United States Supreme Court held that a statute fixing the price for which a theater ticket could be sold was violative of the Fourteenth Amendment. The majority opinion, however, was based on the "affected with a public interest" test which was later discarded in *Nebbia v. New York.*[11]

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[1]It shall be unlawful for any person, firm or corporation to sell, offer for sale, conduct the business of selling or offering for sale, or solicit any person to purchase, any ticket of admission or any other evidence of the right of entry to any performance, exhibition, theater, concert hall, circus, common show, contest game, race, fair, entertainment or other place of public amusement or recreation at any price or amount which is either less or greater than the price or amount at or for which such ticket of admission or other evidence of the right of entry may be procured at the regularly authorized places of sale.

[2]Ind. Const. Art. I, § 21 provides: "No man's particular service shall be demanded without just compensation. No man's property shall be taken by law, without just compensation; nor, except in case of the state, without such compensation first assessed and tendered." Ind. Const. Art. I, § 1 provides: "We declare, that all men are created equal; that they are endowed by their creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government."

[3]Franklin v. Alabama State Milk Control Board, 232 Ala. 637, 169 So. 295 (1941).

[4]Munn v. Illinois, 94 U.S. 113 (1877).

[5]Olsen v. State of Nebraska, 313 U.S. 236 (1941); Abbe Employment Agency v. Robinson, 2 N.Y.S.2d 947 (1938).

[6]Miami Laundry Company v. Florida Dry Cleaning & Laundry Board, 134 Fla. 1, 183 So. 759 (1938).

[7]Townsend v. Yeomans, 301 U.S. 441 (1937).

[8]See note 3 *supra.*

[9]Tyson & Bros. United Theater Ticket Offices inc. v. Banton, 273 U.S. 418 (1927); *Ex Parte* Quarg, 149 Cal. 79, 84 Pac. 766 (1906); People v. Steel, 231 Ill. 240, 83 N.E. 236 (1907).

[10]Tyson case, *supra* note 9.

[11]291 U.S. 502 (1934).

The fact that this test has been rejected and the tendency of the federal courts in recent years has been to uphold state price fixing legislation indicates that the federal courts might not declare a similar statute invalid today as being violative of substantive due process.

Moreover, there has been a tendency in recent years for state courts to leave to the legislature the power to determine when an abuse exists which may affect the public health, safety, morality, comfort, and general welfare; and when such abuses occur the legislature may remedy the situation by statute.[12]

Since World War II the demand for seats at large sporting events has, in many instances, greatly exceeded the supply, thus leaving an opening for unscruplous persons to speculate on admission tickets at the expense of honest promoters and the public. This being true, it would seem that the state had more than ample justification for the possible infringement of any property right involved.[13]

George E. Peacock

Constitutional Law—State Action Under Equal Protection Clause of the Fourteenth Amendment

The New York Redevelopment Companies Act[1] authorized defendant corporation to exercise the right of eminent domain and receive partial tax exemption for slum clearance and the construction of a housing development. Defendant is privately owned, but its rents, profits and dividends are regulated by statute. Defendant maintains streets and parks, and provides police and fire protection for the settlement of 45,000 people. Signs are posted at every entrance stating that the settlement is private property. Plaintiff sought to enjoin defendants from refusing apartments in the housing project to persons because of race or color on the ground that it was violative of the Fourteenth Amendment. Held: Refusal of private corporation to consider applicants as tenants because of race, color, creed or religion is not "state action" so as to violate equal protection clause of Fourteenth Amendment. *Dorsey v. Stuyvesant Town Corporation,* 87 N.W.2d 541 (N.Y. 1949).

The equal protection clause of the Fourteenth Amendment inhibits only state action.[2] It "erects no shield against private conduct, however discriminatory or wrongful."[3] The difficulty arises when one considers the problem of what is state action.

The concept of "state action" has greatly expanded during the sixty-seven years since the *Civil Rights Cases.* It is no longer confined to direct government action

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[12]It is for the legislature to determine when conditions exist that call for the exercise of the police power, and when the legislature has acted the presumption is that the act is a valid exercise of such power. Zelney v. Murphy, 387 Ill. 492, 56 N.E.2d 754.

[13]Compare the Miss. statute: "It shall be unlawful for any admission ticket to any athletic contest of any college or university of the state of Mississippi to be sold for a price in excess of the price printed on the face of the ticket." Miss. Laws 1948, c. 370.

[1]N.Y. Unconsol. Laws §§ 3401-3426.

[2]Nixon v. Condon, 286 U.S. 73 (1932); Virginia v. Rives, 100 U.S. 313 (1879); *Ex Parte* Virginia, 100 U.S. 339 (1879); United States v. Cruikshank, 92 U.S. 542 (1875). See Barnett, *What is State Action Under the Fourteenth, Fifteenth and Nineteenth Amendments of the Constitution?* 24 Ore. L. Rev. 227 (1945).

[3]Shelley v. Kraemer, 334 U.S. I (1947); Civil Rights Cases, 109 U.S. 3, (1883).

but "refers to exertions of state power in all forms."[4] It now protects the rights of individuals and minorities from many abuses of government power which were not contemplated at the time of the amendment's adoption.[5]

Indications of this expansion are readily found in the court's attitude toward labor unions.[6] The recent case of *Steele v. Louisville and Nashville Railroad Company*[7] held that a labor union, empowered by the Federal Railway Labor Act to represent the entire industry, could not discriminate against Negro members. Extending the *Steele* case, a Kansas decision not only enjoined discrimination in bargaining but also ordered the union to grant full membership to Negro railroad workers.[8] Thus the scope of "public action" has been enlarged in order to prevent discrimination by "private organizations."

Similar constitutional issues were resolved by the Supreme Court in *Smith v. Allwright*.[9] The denial by a political party of the right of a Negro to vote in its primary was held unconstitutional because the party was considered a "state agency." The party was subject to legislative control and had received legislative benefits, hence it was bound by the constitutional limitation of the legislature. The Court recognized that suffrage is a matter of such importance that a minimum of state regulation is sufficient to alter the constitutional status of a private organization.

It would seem that housing, one of the basic needs of existence, is of equal importance.[10] The quantum of governmental regulation of Stuyvesant Town appears far greater than its counterpart in the *Allwright* case. While it seems probable that political parties could function without legislative controls and benefits, Stuyvesant Town could never have been realized without public aid and power extended by the legislature. Since state action was an essential element in the creation of the settlement, it would seem that the entire enterprise might be considered under contemporary theory an instrumentality of the state and thus subject to the constitutional standard required of it.[11]

Another situation analogous to he instant case is the "corporation town" in *Marsh v. Alabama*.[12] There, a private corporation owned the entire town, provided police and fire protection, paved streets and sidewalks, and actively managed the community. It attempted to impose criminal punishment upon a Jehovah's Witness for remaining on the property after having been ordered off in accordance with a state statute. The Supreme Court refused to impose the punishment and held that the state could not, consistently with the freedom of religion and press guaranteed by the

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[4]Shelley v. Kraemer, *supra* note 3.

[5]Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1947); Home Telephone and Telegraph Co. v. Los Angeles, 227 U.S. 278 (1913); Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907); Chicago, Burlington and Quincy R.R. v. Chicago, 16 U.S. 216 (1897); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir. 1945). See Note, 61 HAR. L. REV. 344 (1948).

[6]Miller, *Individual Invasion of Individual Rights*, 3 NAT. BAR. J. 126 (1945).

[7]323 U.S. 192 (1944).

[8]Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946). See Williams v. International Brotherhood, 27 Cal.2d 586, 165 P.2d 903 (1946).

[9]321 U.S. 649 (1944).

[10]"Housing is a necessity of life; All of the elements of a public interest justifying some degree of public control are present." Holmes, J., upholding the Rent Control Act of 1919 for the District of Columbia. Block v. Hirsh, 256 U.S. 135 (1921).

[11]Note, *Race Discrimination in Housing*, 57 YALE L. J. 426 (1948).

[12]326 U.S. 501 (1946).

Constitution, impose punishment on a person for distributing religious literature on the sidewalk of such a town, when the town is freely accessible to the public. This case recognizes the public nature of large settlements even though completely owned and operated by private organizations. Such an argument might well succeed in the instant case.[13]

The Court's current sentiment against discrimination[14] has resulted in an expansion of the concept of "state action" in the recent restrictive covenant and suffrage cases, and would seem to indicate its views on racial discrimination by so-called "private" organizations.[15] Stuyvesant Town may be open to the same attacks.

James R. Billingsley

Contracts—Non-Compliance with Registration Statute as Bar to Action for Breach of Contract

Plaintiff vendor, who had admittedly failed to comply with state statute[1] requiring registration of dealers in fertilizer, brought action for damages for breach of contract to purchase commercial fertilizer. Held: Failure to comply with registration and inspection requirements of state statutes did not preclude seller from maintaining action for damages. In the absence of a statutory provision declaring a forfeiture, none will be imposed. "If the Legislature had intended to impose a penalty so drastic, it should have been declared by statutory enactment." *Gardner v. Reed,* 42 So.2d 206 (Miss. 1949).

Non-compliance with statutory registration and inspection provisions is punishable as a misdemeanor.[2] There is no provision making contracts in violation of the statute non-enforceable. Generally, however, if the purpose of a statute is the protection of the public, a contract made in violation thereof is unenforceable, even though it may incidentally raise revenue.[3]

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[13]Another possible line of attack upon Stuyvesant Town is that the city of New York has accomplished racial zoning indirectly through contract with a private corporation. That which cannot be accomplished by ordinance cannot be accomplished indirectly through agreements with private parties. Buchanan v. Warley, 245 U.S. 60 (1917).

[14]Scanlan, *Racial Restrictions in Real Estate—Property Values versus Human Values,* 24 Notre Dame Law. 157 (1949); Ming, *Racial Restriction and the Fourteenth Amendment: The Restrictive Covenant Cases,* 16 U. of Chi. L. Rev. 203 (1949).

[15]Kerr v. Enoch Pratt Free Library, *supra* note 5. The defendant in this decision was a privately endowed library, governed by a self-perpetuating board of trustees, appointed by the original donor. The city and state contributed most of its operating funds. The court held the refusal to admit Negroes to the library's training school for librarians to be state action and violative of the Fourteenth Amendment.

[1]Miss. Code § 4450 *et seq.* (1942). § 4452 provides: "Before any maufacturer, jobber, firm or person shall sell, distribute or offer for sale or distribution in this state any commercial fertilizer or fertilizer material he or they shall file with the commissioner of agriculture and commerce and also with the state chemist, on form supplied by them, a copy of the statement specified in preceding section, with the exception of subdivision (a), for each brand of commercial fertilizer or fertilizer material. The statement so submitted shall be known as the guaranteed analysis, or as the registration, or as the guarantee, and when accepted and registered by the commissioner of agriculture and commerce and by the state chemist shall be valid only for the fiscal period or season for which it is so accepted and registered."

[2]Miss. Code § 4468 (1942), as amended, Miss. Laws 1946, c. 226.

[3]6 Williston, Contracts § 1768 (Rev. ed. 1938); Elliott, Contracts § 267 (1913).

The purpose of the Mississippi statute is twofold.[4] Numerous decisions relating to the sale of fertilizer follow the principle that even though the sale is not illegal in itself, there can be no recovery of the price by the seller who fails to comply with some statutory requirement.[5] An Alabama case[6] involving statutes[7] and circumstances similar to the instant case denied recovery to the vendor. Arkansas follows the same general policy.[8]

The Mississippi Court has enforced contracts which were merely *malum prohibitum* where revenue statutes were involved.[9] In allowing recovery where the statute involves both the protection of farmers and the raising of revenue it has apparently followed the minority view.[10]

The problem is one of legislative intent, and the courts must look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished by the enactment of the statute.[11]

The particular circumstances of this case are alone sufficient to justify following the minority view. The seller was not required to comply with the statutory provisions prior to the date of breach of contract, and when sale was later made to third parties, the proper analysis of the fertilizer accompanied the shipments.

The court in refusing to allow contrary decisions in other jurisdictions to affect its reasoning has reached the better result. By allowing the vendor to recover it has not permitted any wrong or evil which the statute seeks to prevent. Instead, it has given effect to a contract which covered the purchase of a lawful commodity, and was not *malum in se* but merely *malum prohibitum*.[12]

W. Kelly Clifford

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[4]At page 208 the court said: ". . . the statutes here involved are both for the raising of revenue . . . as well as for the protection of the farmers. . . ."

[5]Bowdoin v. Ala. Chemical Co., 201 Ala. 582, 79 So. 4 (1918); Pacific Guano Co. v. Mullen, 66 Ala. 582 (1880); Lorentz v. Spurrier, 94 Ky. 22, 21 S.W. 337 (1893); Adler v. Zimmerman, 233 N.Y. 431, 135 N.E. 840 (1922). In some jurisdictions recovery of the price may be denied even when the only illegality is breach of a requirement under statutory penalty that the seller shall take out the license, if the purpose of the statute is partly for the protection of the public and not solely for revenue purposes. 6 WILLISTON, CONTRACTS § 1765 (Rev. ed. 1938).

[6]Bowdoin v. Ala. Chemical Co., *supra* note 5. "If the conditions of the statute were for the benefit of the public, and not for the raising of revenue only, an agreement is void that does not comply with the statutory conditions." See also Talladega Fertilizer & Mfg. Co. v. Farmers' Union Warehouse Co., 2 Ala. App. 307, 56 So. 595 (1911); Brown v. Raisin Fertilizer Co., 124 Ala. 221, 26 So. 891 (1899); Edisto Phosphate Co. v. Standford, 112 Ala. 493, 20 So. 613 (1895).

[7]ALA. CODE § 6884 (1907) makes it a misdemeanor to sell or exchange fertilizer without having obtained a license.

[8]Empire Carbon Works v. Barker, 132 Ark. 1, 199 S.W. 929 (1917).

[9]Hartford Fire Ins. Co. v. Knight, 146 Miss. 862, 111 So. 748 (1927); Levinson v. Cox, 127 Miss. 250, 90 So. 1 (1921); Huddleston v. McMillan Bros., 112 Miss. 168, 72 So. 892 (1916).

[10]Niemeyer v. Wright, 75 Va. 239, 40 Am. Rep. 720 (1881). See also John E. Rosaco Creameries, Inc. v. Cohen, 249 App. Div. 228, 292 N.Y. Supp. 1, 11 N.E.2d 908 (1937) where the court said: "The statute imposes penalties for its violation by way of fine and imprisonment, but . . . where the wrong committed by the violation of the statute is merely *malum prohibitum*, and does not endanger health or morals, such additional punishment should not be imposed unless the legislative intent is expressed or appears by clear implication." 6 WILLISTON, CONTRACTS § 1765 (Rev. ed. 1938).

[11]17 C.J.S., CONTRACTS 558.

[12]42 So.2d 206, 208 (Miss. 1949).

Corporations—Right of Corporation to Protect Against Corporations of Similar Names

Plaintiff received its corporate name of "Meridian Yellow Cab Company" in 1945, but did not begin operation of its taxicabs until April, 1948. Defendant commenced operations promptly in February of 1948 upon being granted its corporate designation of "City Yellow Cabs." Plaintiff brought action, predicated upon a Mississippi statute,[1] to enjoin defendant from using corporate name containing the words "Yellow Cabs" or any corporate name similar to that of plaintiff. Defendant contended that its charter was secured according to state law, and that plaintiff did not undertake corporate operations until two months after defendant had begun. Held: Statutory right to have corporate name distinguished from other corporations subsequently created commences from the time of corporate existence, and proof of such corporate name in actual business operations is not a condition precedent. *Meridian Yellow Cab Company v. City Yellow Cabs,* 41 So.2d 14 (Miss. 1949).

The intrinsic value of a name generally comes from what that name identifies. The courts have given natural persons considerable freedom in associating their names with business activities, for the average individual has no voice in the choice of his name. This has been allowed even where the name employed is similar to or identical with that employed by an existing enterprise.[2] Such freedom of choice has been removed upon proof of want of good faith and honest purpose.[3]

Moreover, the usual corporate name results from its deliberate selection by the promoters or founders; and, consequently, the courts stand ready to protect existing corporations from the harm which a misleading name might cause. The rule is universally recognized that a corporation is entitled to protection against the use of a similar or identical name by another corporation.[4]

However, the point of principal interest in the instant case is that the plaintiff was not an *actual user* of its corporate name prior to the defendant's incorporation. Since the general protection awarded corporate names in the statute finds its basis in equitable regulation of "unfair competition," the result here reached by the Mississippi court can be analogized to the equitable relief granted in the case of trade-

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[1]Miss. Code § 5322: "No corporation shall be created under the laws of this state with the name of any existing corporation of this state nor with the name of any company or corporation for profit incorporated under or by virtue of the laws of any government, or of any other state or territory, now or hereafter doing business in this state which has heretofore filed or may hereafter file in the office of the secretary of state of Mississippi a copy of its charter or articles of incorporation or certificate of incorporation, as required by the laws of this state, or with a name so similar thereto as to be misleading."

[2]Horlick's Malted Milk Corp. v. Horluck's Inc., 59 F.2d 13 (9th Cir. 1932); Yale & Towne Mfg. Co. v. Rose, 120 Conn. 373, 181 Atl. 8 (1935); Fitzgerald's Atlantic Bar & Grill, Inc. v. Fitzgerald, 179 Misc. 472, 40 N.Y.S.2d 341 (Sup. Ct. 1942).

[3]De Nobili Cigar Co. v. Nobile Cigar Co., 56 F.2d 324 (1st Cir. 1932); M. M. Newcomer Co. v. Newcomer's New Store, 142 Tenn. 108, 217 S.W. 822 (1919). See Comment, 39 Mich. L.J. 1047 (1941).

[4]Ballantine on Corporations § 116 (1946); see Note, 66 A.L.R. 948, 951 (1930).

marks and trade names.[5] While many theoretical distinctions have been drawn between trade-marks and trade names, it has been suggested that the basic criterion of distinction is largely etymological,[6] and that most of them disappear in actual practice.[7]

At any rate it has been said that only an *actual user* may obtain an exclusive trade-mark or trade name.[8] In this connection courts have held that public policy prevents a monopoly in a corporate name, where there is no active use of the name.[9] Therefore, if one takes the premise that the right of action granted by the Mississippi statute exists regardless of legislation,[10] such statutes being merely declaratory of long-existing equitable protection,[11] one might logically conclude that in substance use is more important than the formal act of incorporation.

On the other hand, statutory relief has been granted where the plaintiff corporation was not actively engaged in business, on the ground that the statute removed the necessity of actual user.[12]

Problems of this type appear generally to resolve themselves into a matter of statutory construction. The states have put the ultimate responsibility upon the courts to determine if the particular facts involved constitute a situation that demands readjustment for the benefit of business and the general public.[13] Since the court in the

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[5]For example of decisions based upon this analogy, see National Circle, Daughters of Isabella v. National Order of Daughters of Isabella, 270 Fed. 723 (2d Cir. 1920), *cert. denied,* 255 U.S. 571 (1921); Household Finance Corp. of Del. v. Household Finance Corp. of West Virginia, 11 F. Supp. 3 (N.D. W.Va. 1935); Armington v. Palmer, 21 R.I. 109, 42 Atl. 308 (1898).

[6]Note, *Trademarks and Tradenames—An Analysis and Synthesis,* 30 COL. L.R. 168, 169 (1930).

[7]NIMS, UNFAIR COMPETITION AND TRADE-MARKS, § 1 (4th ed. 1947); Hanover Star Milling Co. v. Metcalf, 240 U.S. 403 (1916); Anheuser-Busch v. Budweiser Malt Products Corp., 287 Fed. 243 (2d Cir. 1921); Steem-Electric Corp. v. Herzfeld-Phillipson Co., 118 F.2d 122 (7th Cir. 1940); Coty, Inc. v. Parfums de Grande Luxe, 298 Fed. 865 (2d Cir. 1924).

[8]28 AM. & ENG. ENCY. 393 (2d ed. 1904); Caswell v. Hazard, 121 N.Y. 484, 24 N.E. 707 (1890); Kathreiner's Malzkaffee Fabriken Mit Beschraenkter Haftung v. Pastor Kneipp Medicine Co., 82 Fed. 321 (7th Cir. 1897).

[9]Blackwell's Durham Tobacco Co. v. American Tobacco Co., 145 N.C. 367, 59 S.E. 123 (1907): "It cannot be the law that three or more persons may, either under our general corporation law or special act of the legislature . . . without engaging in the business of buying, selling, or manufacturing the article or product named in its charter, acquire a perpetual monopoly in the corporate name." See Hygeia Water Ice Co. v. New York Hygeia Co., 140 N.Y. 94, 35 S.E. 417 (1893).

[10]13 AM. JUR. § 134; DONALDSON, BUSINESS ORGANIZATION AND PROCEDURE 171 (5th ed. 1938).

[11]Driverless Car Co. v. Glessner-Thornberry Car Co., 83 Colo. 262, 264 Pac. 653 (1928); Standard Oilshares v. Standard Oil Group, 17 Del. Ch. 113, 150 Atl. 174 (1930).

[12]Drugs Consolidated v. Drug Incorporated, 16 Del. Ch. 240, 144 Atl. 656 (1929): "The statute thus removes the necessity of showing actual use in business of the name, a use which many cases dealing with the general law of unfair competition require as a prerequisite to relief in tradename and trade-mark controversies." (Following this decision, the Delaware statute was amended to conform undoubtedly with general law of unfair competition. See Standard Oilshares v. Standard Oil Group, *supra* note 11.)

[13]See Federal Securities Co. v. Federal Securities Corp., 129 Ore. 375, 276 Pac. 1100 (1929): "But, to justify relief, the circumstances must be such that it appears that the business will suffer from a deceptive use of its name, or that by reason of a simple act of unfair competition, the public will be imposed upon."

instant case considered the statute as not declaratory of common law principles, the question of prior user was not involved. Nevertheless the decision unnecessarily avoided a careful consideration of the general policies prevailing before the adoption of the statute.

William F. Goodman, Jr.

Damages—Mental Anguish Resulting From Breach of Contract

Plaintiff contracted with defendant undertakers to properly inter her deceased husband in a watertight vault. Nearly four months later plaintiff discovered that the vault had risen to the surface. As a result of defendant's breach of contract, plaintiff suffered mental anguish, but trial court instructed the jury that plaintiff could recover only if the mental injury resulted from defendant's wilful and independent tort. Held: Damages for mental anguish may be recovered for breach of contract where the contract is personal in nature and so coupled with the sensibilities of the party to whom the duty is owed that a breach will necessarily or reasonably result in mental anguish and the parties should have known from the nature of the contract that such mental anguish would result from its breach. *Lamon v. Shingleton,* 55 S.E.2d 810 (N.C. 1949).

In general, damages for mental anguish suffered by reason of a breach of contract are not recoverable.[1] However, this rule is not absolute. In most jurisdictions the courts allow recovery in cases involving the plaintiff's relations with his family where the breach amounts in substance to a willful and independent tort;[2] but only a minority of the courts follow a more modern doctrine and allow recovery on a breach of contract theory. And this minority restricts recovery to cases where such mental anguish is the natural result of the breach, or within the contemplation of the parties at the time of entering into the contract.[3]

At least fourteen states[4] follow the majority rule and hold that no damages will be awarded for mental distress resulting from breach of contract unaccompanied by physical injury.[5] These states admit as exceptions only those cases involving mistreatment of guest by hotels or carriers, and actions for breach of contract to marry. A larger group of states adhere to this theory in most cases, but adopt the modern rule when presented with extreme facts such as those in the principal case.[6] Although no decision involving similar facts has arisen in Mississippi, it would seem, by analogy

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[1]15 Am. Jur., Damages 182; McCormick on Damages 692 (1935); see Note, 56 A.L.R. 657 (1928).

[2]15 Am. Jur., Damages 179; see Note, 12 A.L.R. 342 (1921).

[3]15 Am. Jur. Damages 182; McCormick on Damages 595 (1935); Reick v. Maple Hill Cemetery Ass'n, 31 Lux L. Rep. 213 (Pa. 1937); Duggan, *Mental Anguish in the Law of Damages,* 2 Notre Dame Law, 4 (1926).

[4]McCormick on Damages 595 n. 57 (1935).

[5]Dunahoo v. Bess, 146 Fla. 184, 200 So. 541 (1941); Beaulieu v. Great Northern Ry., 103 Minn. 47, 114 N.W. 353 (1907) (carrying corpse past destination); Spiegal v. Evergreen Cemetery, 117 N.J.L. 90, 186 Atl. 585 (1936); Morton v. Western Union Tel. Co., 53 Ohio St. 431, 41 N.E. 689 (1895) (death message); Nail v. McCullough &Lee, 88 Okla. 343, 212 Pac. 981 (1923) (destruction of hearse and body before reaching cemetery); Kneass v. Cremation Society of Washington, 103 Wash. 531, 175 Pac. 172 (1918) (ashes of plaintiff's child lost).

[6]Wright v. Beardsley, 46 Wash. 16, 89 Pac. 172 (1902) (child buried in cheap coffin in shallow grave).

to cases involving the same principle of law, that Mississippi follows the majority rule in all circumstances.[7]

However, when the interest of the plaintiff infringed by the defendant's breach is not merely a pecuniary one, but where the plaintiff's relations with his family are affected as in the principal case, the courts are more prone to allow recovery on a breach of contract theory. The most notable of these cases allow damages for mental anguish resulting from: (1) the failure to transmit a death message in time for the funeral;[8] (2) the violation of contracts for the transportation of the body of a near relative;[9] and (3) the breach by an undertaker of his contractual obligations relating to the burial.[10]

From a consideration of the above cases, it is submitted that the courts which have adopted the modern view have applied the more just policy. Violations of contracts which greatly affect a party's relations with his family are almost irresistible in their appeal to one's instinctive feeling that justice demands redress for such grievous wrongs. Some commercialization of sentiment results from the adoption of this view, but the need for this remedy is greater than any disadvantages which can be foreseen.

R. O. Arrington, Jr.

Equity—Vacation Consent Decree Set Aside

A decree was entered in vacation cancelling clouds on plaintiff's title to realty. The chancellor understood this to be a consent decree embodying the real settlement between the parties. Immediately thereafter defendants filed a petition to set aside the decree on the ground that it did not embody the true settlement agreement, which had been misunderstood by the parties and their attorneys. Held: It was within the chancellor's authority on hearing the petition in vacation to set aside the original final decree. *Myers v. Clark,* 42 So.2d 817 (Miss. 1949).

The court, in the instant case, was faced with two well recognized obstacles which had to be overcome in order to arrive at the stated decision. The first is the unimpeachable nature of a consent decree, and the second is that in general decrees may only be attacked by instituting a new, plenary action.

In regard to the first of these, it has been held that a decree within the issues raised by the pleadings is absolutely conclusive when consented to by the parties.[1] Even where a statute gave the court authority to set aside a decree within six months, it was held that a consent decree could not be thus set aside, except by agreement of the parties.[2] This view is based on principles of contract[3] and waiver.[4]

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[7]Doherty v. Mississippi Power Co., 178 Miss. 204, 173 So. 387 (1937); Mississippi Power Co. v. Byrd, 160 Miss. 71, 133 So. 193 (1931); Mobile & O. R.R. Co. v. Flannagan, 141 Miss. 7, 105 So. 749 (1925); Gulf & S.I.R.R. v. Beard, 129 Miss. 827, 93 So. 357 (1922).

[8]C. O. So Relle v. Western Union Tel. Co., 55 Tex. 308 (1881).

[9]Lindh v. Great Northern Ry., 99 Minn. 408, 109 N.W. 823 (1906); Hel v. Bonner, 82 Tex. 33, 17 S.W. 605 (1891).

[10]Wright v. Beardsley, *supra* note 6; Renihan v. Wright, 125 Ind. 536, 25 N.E. 822 (1890).

[1]Schmidt v. Oregon Gold Mining Co., 28 Ore. 9, 49 Pac. 406 (1895).

[2]Hyde v. Superior Court, 38 R.I. 204, 66 Atl. 292 (1907).

[3]Covington v. Cassidy Bayou Drainage Dist., 154 Miss. 119, 122 So. 205 (1929).

[4]Nixon v. Nixon, 245 Ala. 43, 15 So.2d 561 (1943).

In regard to the second obstacle: Although a court of equity has the authority to re-examine a judgment or decree previously entered,[5] this power may be exercised only in a properly brought suit. The procedure usually followed in such cases is the filing of a bill of review[6] or writ of coram nobis,[7] which are in the nature of original bills.[8] Aside from these procedures the general rule is that a final decree may not be set aside after the expiration of the term,[9] which in vacation is considered expired when the decree is entered.[10]

Where the facts are such that these two principles are applicable in the same suit the courts have generally considered them to be conclusive.[11] It has been said by way of dictum that the only way in which a consent decree can be attacked is by an original bill alleging fraud.[12] The view has been taken that a motion to reinstate a cause on the docket in the same term in which the consent decree was entered was properly denied.[13]

The Mississippi Supreme Court has held in cases originating in both the circuit[14] and chancery[15] courts, with facts very similar to those of the instant case, that the judgment or decree could not be vacated. However, there are several decisions the rationale of which would indicate that this rule should not be applied where extreme hardship would result.[16]

Fraud, of course, vitiates a decree,[17] and when so obtained it may be vacated on motion and proper hearing at anytime.[18] Although the possibility of fraud is mentioned in the principal case, the decision is clearly based on mistake or misunderstanding among the parties and their attorneys as to what the consent decree should

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[5]Brown v. Wesson, 114 Miss. 216, 74 So. 831 (1917).

[6]Robertson v. Aetna Insurance Company, 134 Miss. 398, 98 So. 833 (1924); GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 642 (1925).

[7]Corry v. Buddendorff, 98 Miss. 98, 54 So. 84 (1911); Cole v. Walker Fertilizer Co., 147 Fla. 1, 1 So.2d 864 (1941); Williams v. Yelvington, 103 Fla. 145, 137 So. 156 (1931).

[8]A court also has the inherent power to correct clerical errors in judgments and decrees at a subsequent term. Rowell & Co. v. Sandifer, 129 Miss. 167, 91 So. 899 (1922); Wilson v. Town of Hansboro, 99 Miss. 252, 54 So. 845 (1911). This power is also provided for by statute in Mississippi. MISS. CODE § 1670 (1942). Judge, in vacation, may amend or correct decree or judgment where there is mistake, miscalculation, or misrecital of any sum of money, quantity of any thing, or of any name.

[9]J. A. Cotten v. Catherine McGehee, 54 Miss. 621 (1877).

[10]*Ex parte* Stanfield, 98 Miss. 214, 53 So. 538 (1910). It was held here that the chancellor was without authority to vacate a decree in term time which had been rendered in vacation. The court, in the instant case, limited this decision to the removal of disabilities of minority by decrees improvidently rendered.

[11]Crow v. Harrison, 248 Ill. 462, 94 N.E. 4 (1911); Hurst v. Gulf States Creosoting Co., 163 Miss. 512, 141 So. 346 (1932); Covington v. Cassidy Bayou Drainage Dist., 154 Miss. 119, 122 So. 205 (1929); Schmidt v. Oregon Gold Mining Co., *supra* note 1; Hyde v. Superior Court, 28 R.I. 204, 66 Atl. 292 (1907).

[12]Schmidt v. Oregon Gold Mining Co., *supra* note 1.

[13]Crow v. Harrison, *supra* note 11.

[14]Hurst v. Gulf States Creosoting Co., *supra* note 11.

[15]Anderson v. McInnis, 99 Miss. 823, 56 So. 170 (1911).

[16]Hester v. Bishop, 193 Miss. 449, 10 So.2d 350 (1942); Germain v. Harwell, 108 Miss. 396, 66 So. 396 (1914).

[17]Watts v. Watts, 123 Miss. 812, 86 So. 353 (1920).

[18]Weems v. Vowell, 122 Miss. 342, 84 So. 249 (1920). GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 644 (1925).

be. The court said that this fact alone was enough to overcome both of the obstacles involved.[19] Thus a second exception was added to the general rule of finality.

Mistake is one of the original sources of equity jurisdiction,[20] and the court's power in original cases is as broad as it is in the cases of fraud.[21] But, the effect of the instant decision is to extend this power to a point not heretofore attained: the revision for mistake of an enrolled consent decree by the use of an interlocutory petition. Although this case may prevent hardship in some situations, it would seem that the same result can be reached by previously established plenary suits. It is questionable as to whether this departure from earlier rules is consistent with a sound administration of justice.

E. Bonnie Mills

EVIDENCE—CONFESSIONS—UNREASONABLE DELAY IN ARRAIGNMENT AFFECTING ADMISSIBILITY OF CONFESSION

Defendant was arrested on suspicion of various crimes at 5:30 P.M. and taken immediately to jail. The magistrate's courts were closed when the arrest was made, so the police questioned him until 9:30 P.M. at which time he confessed a murder with which he was not at first charged. He substantiated the confession by a trip to the scene of the crime, then repeated his statement before several witnesses, all of whom testified that they had observed no duress. Within 48 hours he repeated his confession to county officers. He was not arraigned until a considerable time after the confessions, but the court did not state the specific time of arraignment. Defendant claimed that the questioning by police before the confession and his detention without arraignment after it aggregate such coercion as to render his confession involuntary and therefore inadmissible.[1] HELD: When a suspect is arrested after the magistrate's court is closed, the police may properly question him on the night of the arrest without rendering the confession involuntary, and a violation after the confession of statutory requirements for arraignment without unnecessary delay does not render such confession involuntary. *Moore v. State,* 41 So.2d 368 (Miss. 1949).

No two of the forty-nine American jurisdictions seem to apply the same tests in solving the factual problem of what constitutes such unreasonable delay in arraignment of an accused criminal as will render a confession taken during such delay involuntary. The primary test would appear to be whether the delay induced the confession,[2] but one federal case holds that even this need not be shown,[3] that an unreasonable delay even of forty-five minutes before a confession was made was enough to cause that confession to be struck down.

In a leading case, *McNabb v. United States,*[4] the court concluded that a delay in

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[19]GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 633 (1925).

[20]Albert v. Martin Custom Made Tires Corp., 116 F.2d 962 (2d Cir. 1941); Hargis v. Turner, 274 Ky. 41, 117 S.W.2d 1023 (1938).

[21]Brown v. Wesson, 114 Miss. 216, 74 So. 831 (1917).

[1]MISS. CODE § 2473 (1942) requires arraignment "without unnecessary delay"; FEDERAL CRIMINAL PROCEDURE ACT, Rule 5b sets forth the same mandate.

[2]State v. Behler, 65 Idaho 464, 146 P.2d 338 (1944).

[3]Garner v. United States, 174 F.2d 499 (D.C. Cir. 1949).

[4]318 U.S. 332 (1943) wherein five members of the McNabb family were arrested in their home near Nashville, Tenn., on suspicion of having murdered a revenue agent. This was the first case that gave teeth to the federal statute requiring arraignment "without unnecessary delay."

arraigning one defendant from 2 A.M. Thursday morning, and another from 9 A.M. Friday, until Saturday morning was unreasonable and that confessions taken after this time should not stand. The court considered among other factors, the educational deficiencies of the defendants.[5]

In many cases very short delays in arraignment have rendered confessions inadmissible.[6] On the other hand it has been held that an illegal delay in arraignment alone is not enough to render a confession inadmissible.[7] One state court observed that the defendant had waived preliminary hearing, but nevertheless indicated that the confession would have been inadmissible if the delay had been for the purpose of obtaining the confession.[8] Where no such purpose was evident, there are many cases that hold confessions admissible where there was a relatively long delay in arraignment.[9]

The cases indicate an overlapping of reasonable and unreasonable periods of delay before arraignment. Whereas one court has ruled out a confession because arraignment was not immediate upon arrest, another has admitted a confession rendered after seven days of detainment without preliminary hearing. In fact the time element is only one of many tests for determining the voluntariness of a confession made between the time of arrest and of arraignment. Certainly unreasonable delay after the confession is made will not render inadmissible a voluntary confession.[10]

To determine, then, whether in the absence of an other element of duress, a confession will be excluded, the court might well ask whether the psychological effect of unreasonable detention was a deciding factor in the rendering of the confession.

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[5]Another factor in the decision was the fear of prejudice on the part of the arresting officers since deceased was a federal agent. See also Ashcraft v. Tenn., 322 U.S. 143 (1933) for a holding that unreasonable detention was "inherently coercive."

[6]People v. Snyder, 297 N.Y. 81, 74 N.E.2d 657 (1947) wherein the court held delays of 38 and 33 hours to be excessive; People v. Cohen, 41 N.Y.S.2d 46 (1939) reversing the trial court's decision that the jury should not be allowed to consider the fact that a confession was obtained after a 24 hour delay in arraignment; People v. Crabb, 372 Ill. 347, 24 N.E.2d 46 (1939) in which the Supreme Court of Illinois struck down a confession because of the failure of the arresting officer to comply literally with the requirement of immediate arraignment.

[7]People v. Vinci, 295 Ill. 419, 129 N.E. 193 (1920); People v. Tyrus, 219 N.Y. 18, 113 N.E. 538 (1916); Cates v. State, 118 Tex. Cr. Rep. 35, 37 S.W.2d 1031 (1930).

[8]State v. Behler, *supra* note 2.

[9]State v. Higdon, 356 Mo. 1058, 204 S.W.2d 754 (1947) in which case arraignment was deferred and a confession was obtained after 20 hours of imprisonment; State v. Alex, 265 N.Y. 192, 192 N.E. 289 (1934) wherein a confession was admitted which was procured 36 hours after arrest; and Wheeler v. United States, 165 F.2d 225 (D.C. Cir. 1947) in which the confession came 48 hours after arrest. See also Boone v. United States, 164 F.2d 102 (D.C. Cir. 1947); People v. Nagle, 25 Cal.2d 216, P.2d 344 (1944); People v. Malinski, 292 N.Y. 360, 55 N.E.2d 353 (1944); and State v. Ellis, 35 Mo. 998, 193 S.W.2d 31 (1946) for even longer dalays in arraignment which did not render confessions inadmissible.

[10]United States v. Mitchell, 322 U.S. 65 (1944); State v. Nagel, 28 N.W. 665 (N.D. 1947).

It would appear from the *McNabb* case[11] that the federal courts apply a subjective rather than an objective test in determining the effect of detention.

The criterion is not whether a defendant has been deprived of his constitutional right of arraignment without unreasonable delay, but whether the defendant has been compelled to confess by such force as renders that confession untrustworthy.[12] In determining this subjective fact, delay is merely one factor which must be weighed either alone or in connection with other considerations such as character and mental and education limitations.

Carl E. Guernsey

Legislation—Statute Not Complete in Itself but which Depends on Other Acts to Make it Intelligible Violates Constitutional Prohibition of Reference Laws

Illinois "Mandatory Fair Trade Act" was admittedly violated by appellees who failed to file with the Illinois Liquor Control Commission a copy of a fair trade contract and a schedule of consumer minimum resale prices along with a description of the size and description of the containers of their product. The Illinois Liquor Control Commission revoked appellees' licenses because of such violation of the statute. Held: The Mandatory Fair Trade Act was incomplete because its application necessitated reference to the Liquor Control Act to ascertain the procedure to be followed before the Commission, the Fair Trade Act for the definition of "Fair Trade Contract" and the trademark statutes to determine coverage. Hence it violated the constitutional prohibition of "revival or amendment" of a statute by reference to its title only.[1] *Illinois Liquor Control Commission v. Chicago's Last Liquor Store* and *Illinois Liquor Control Commission v. Three Feathers Distributors,* 88 N.E.2d 15 (Ill. 1949).[2]

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[11]See note 4 *supra.* For further discussion of the McNabb rule see Note, *The McNabb Rule Transformed,* 47 Columbia L. Rev. 1214 (1947), "The federal statutes which require arresting officers to bring the accused promptly before a committing authority constitute an important safeguard against the violation of the rights of individuals." But see Inbau, *Confession Dilemma in the United States Supreme Court,* 43 Ill. L. Rev. 442 (1948), "The McNabb case rule has been harmful in its effects. It has in many instances resulted in the release of dangerous criminals."

[12]3 Wigmore, Evidence § 822 (3d ed. 1940) sets forth trustworthiness rather than voluntariness as the primary test for a confession obtained after delay in arraignment.

[1]Ill. Const. Art. IV, § 13 provides ". . . and no law shall be revived or amended by reference to its title, but the law revived, or the section amended, shall be inserted at length in the new act."

[2]Other cases holding Fair Trade Acts unconstitutional include Bristol-Myers Company v. Webb's Cut Rate Drug Company, 137 Fla. 508, 188 So. 91 (1939) where the title was held insufficient to appraise the public of the fact that the statute applied to persons not parties to the Fair Trade Contract; Doubleday, Doran & Company, Inc. v. R. H. Macy & Company, Inc., 269 N.Y. 272, 199 N.E. 409 (1936) on grounds that legislature could not itself fix prices and therefore could not do so indirectly by delegating the function to private individuals. *Overruled* in Bourjeois Sales Corp. v. Dorman, 273 N.Y. 167, 7 N.E.2d 30 (1937) in deference to the decision of the United States Supreme Court in Old Dearborn Distributing Company v. Seagram-Distillers Corp., 299 U.S. 183 (1936) which held that the Illinois Fair Trade Act did not deny due process of law and was not an improper delegation of the legislative function. *But see* Scarborough v. Webb's Cut Rate Drug Co., 150 Fla. 754, 8 So.2d 913 (1942) where the Florida Mandatory Liquor Fair Trade Act was held to be an improper delegation of the legislative function.

The constitutional provision which was the basis of the decision in the instant case is found with variations achieving substantially the same result, in the constitutions of several states. In general these are to the effect that a statute shall not be "revised, enlarged or amended,"[3] or as in Illinois, Mississippi and other states, "revived or amended" by reference to title only.[4]

The purpose of such provisions was to remove confusion which resulted from a practice then current to amend a statute by providing in the amending act that a single word or phrase in the amended law, mentioned only by name, should be changed.[5]

Thus an act which is independent in itself and which amends other laws by implication does not violate the spirit of the constitutional provision.[6] It would be burdensome to republish every act which is amended or modified because in conflict with the latter statute.[7]

A statute which purports to be amendatory of prior laws need not set out the entire act amended, but is sufficient if the section amended is brought forward in the amended form.[8] The effect of failure to bring the amended statute forward by republishing it at length is to repeal it[9] unless the legislature clearly expresses the intention that the uneffected portion of the prior law should remain in effect.[10]

An amendatory act which purported to enlarge the then existing law regarding contractors' liens was held to violate the constitutional provision against revival or amendment by reference to title only in *Seay v. Laurel Plumbing and Metal Company*[11] on the ground that the statute did not purport to be complete in itself. But in

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[3]1 Cooley on Constitution Limitations 313 n. 2 (8th ed., Carrington, 1927).

[4]Miss. Const. § 61 provides: "No law shall be revived or amended by reference to its title only, but the section or sections, as amended or revived, shall be inserted at length."

[5]People v. Mahaney, 13 Mich. 481 (1865). Cooley, J., declared in an often quoted opinion, "The michief designed to be remedied was the enactment of statutes in terms so blind that the legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examinations and comparisons failed to become appraised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was referred to but no republished, was well calculated to mislead the caeless as to its effect, and was, perhaps sometime drawn in that form for the express purpose. Endless confusion was thus introduced into the law, and the Constitution wisely prohibited such legislation." See also Brian v. Greenwood, 112 Miss. 718, 73 So. 728 (1917); Ethridge, Modernizing Mississippi's Constitution 17 (State Administration Series No. 12, 1949).

[6]Ellis v. Kroger Grocery and Baking Co., 159 Kan. 213, 152 P.2d 860 (1944); Sartin v. Prentis County, 156 Miss. 46, 125 So. 563 (1930); Heidelberg v. Batson, 119 Miss. 510, 81 So. 225 (1919); Mayor and Board of Aldermen of Jackson v. State, 102 Miss. 663, 59 So. 873 (1912).

[7]City. of Jackson v. Deposit Guaranty Bank and Trust Co., 160 Miss. 753, 133 So. 195 (1931).

[8]Fluger v. State, 192 Miss. 775, 7 So.2d 873 (1942).

[9]Gully v. Holaday, 146 Miss. 718, 145 So. 742 (1933); Bell v. State, 118 Miss. 66, 79 So. 85 (1918); Nations v. Lovejoy, 40 Miss. 401, 31 So. 811 (1902).

[10]Water Valley v. State, 103 Miss. 654, 60 So. 576 (1913).

[11]101 Miss. 834, 71 So. 9 (1916); see also Buford v. State, 146 Miss. 66, 111 So. 850 (1927): "Section 2. c.210 of the Laws of 1922 was manifestly intended to withdraw from the trial judge the discretion to impose a fine, or imprisonment, or both, and made it mandatory on him to impose a term of imprisonment in eaeh case of not less than 90 days. It refers to prior statutes for the fine to be imposed and thereby does exactly what section 61 of the Constitution was, among other things, meant to prevent. *Accord* Holmes v. State, 146 Miss. 315, 111 So. 860 (1927).

Hart v. Backstrom[12] the court sustained the statute though it referred to prior existing laws by use of the phrase ". . . as now provided by law." The recent case of *Corso v. Biloxi*[13] further relaxed the requirement of completeness by upholding a statute which expressly "adopted" the procedure required by a general statute already in force.

The *Corso* case indicates that the certainty of expression of the legislature's intention is to be the major criterion in such cases. Though the widespread use of codification and compilation of laws has obviated in some measure the necessity for such provisions the case under comment seems to represent the better view because it more nearly gives effect to the spirit as well as the letter of the constitutional provision.

G. E. Estes, Jr.

Process—Summons by Publication for Non-Resident

Complainant sought his share of a trust estate set up by will on ground that decree in a former action setting aside the will was void. Complainant was a non-resident defendant in this former action. The bill in that suit had alleged that defendant's "place of residence and post office address is Sherman, Texas." Held: The former decree is void. There was no allegation, as is required by statute,[1] that defendant was a non-resident of Mississippi. This "statute is jurisdictional," and strict compliance with it is necessary to make process by publication valid. *Rice v. McMullen*, 43 So.2d 195 (Miss. 1949).

Unreasonable as it may seem, this case is the latest in an unbroken line of Mississippi decisions reaching a similar result. In order to authorize process by publication against a non-resident, such non-residency must be "positively averred as a fact."[2] An allegation that complainant "is not advised where the defendant is, but that he is confident that she is not in the state of Mississippi, and that the defendant is a non-resident of the state" is not sufficient.[3] Stating that the defendant is temporarily sojourning outside of the state,[4] or that his "post office address is 2406 Eighth Street, New Orleans, Louisiana,"[5] is likewise insufficient.

The Mississippi statute requires a showing as to the post office of the defendant or a showing that such post office is unknown after diligent inquiry. Merely stating that defendant's post office is unknown is not sufficient.[6] Furthermore, there is "a distinction between residence and post office address of a person."[7] An allegation that a certain street number, city and state is defendant's business office,[8] home,[9]

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[12]148 Miss. 13, 113 So. 898 (1927); followed in City of Jackson v. Deposit Guaranty Bank and Trust Co., *supra* note 7.
[13]201 Miss. 532, 29 So.2d 638 (1947).
[1]Miss. Code § 1852 (1942).
[2]McCray v. McCray, 137 Miss. 160, 102 So. 174 (1924).
[3]*Ibid.*
[4]Burns v. Burns, 133 Miss. 485, 97 So. 814 (1923).
[5]Hume v. Inglis, 154 Miss. 481, 122 So. 535 (1929).
[6]Mercantile Acceptance Corp. v. Hedgepeth, 174 Miss. 717, 112 So. 872 (1927).
[7]Shelby v. White, 158 Miss. 880, 131 So. 343 (1930).
[8]*Ibid.*
[9]Ponder v. Martin, 119 Miss. 156, 80 So. 388 (1919).

principal place of business,[10] or even "address"[11] is not a showing as to defendant's post office.

Technically, a court cannot proceed against a person outside of its jurisdiction, but it may proceed against property within its jurisdiction, and thus incidentally take action against non-resident defendants.[12] If any form of process is to be used in lieu of personal service in such cases, justice demands that everything within reason be done to notify the non-resident defendant.[13] The courts have expressed this idea by saying that there must be a strict compliance with the statutes authorizing such process. The reason most often given for this rule is that such statutes are in derogation of the common law, and there must be strict compliance in order to gain their benefits.[14] Hence, all of the material prerequisites to service against a non-resident must be shown to be present.[15] Otherwise, the court has no jurisdiction, and any resulting decree is void.

But the courts have gone farther than this and have demanded strict compliance with the formal as well as the substantive requisites of such statutes, when former decrees are subject to direct attack.[16] There must be a literal compliance. On the other hand, if the attack is collateral, there has been a reluctance to overthrow previous adjudications because of formal deficiencies.[17] This exception has its basis in public policy, a "due consideration of the title to numerous estates, the validity of long-established marriages, the legitimacy of countless children, the peace of many families and the painful consequences which would necessarily ensue . . ."[18]

The arguments which have caused the courts to refuse collateral attacks because of formal deficiencies would seem to apply also in cases of direct attack. Our tribunals must always be careful to protect against fraud and the workings of unethical and dishonest practitioners. On the other hand, justice and sound public policy are against the principle that substantive rights should be denied because of an "inferential or imperfect allegation of a jurisdictional fact."[19] "It borders on the absurd . . . to say an affidavit does not say a party is a non-resident of this state when it does state that the party is a resident of Sherman, Texas."[20]

Tom Crews

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[10]Commercial Credit Co. v. Cook, 164 Miss. 725, 143 So. 863 (1932).

[11]Mays Food Products v. Gloster Lmbr. Co., 137 Miss. 691, 102 So. 735 (1925); Ponder v. Martin, *supra* note 9.

[12]Pennoyer v. Neff, 95 U.S. 714 (1878).

[13]Stanton v. Thompson, 234 Mo. 7, 136 S.W. 698 (1911).

[14]Galpin v. Page, 85 U.S. 350 (1874); Zecharie v. Bowers, 1 Smedes & M. 584 (Miss. 1844); Ricketson v. Ricketson, 26 Cal. 149 (1864); Erickson v. Macy, 231 N.Y. 86, 131 N.E. 744 (1921); Beckett v. Cuenin, 15 Colo. 281, 25 Pac. 167 (1890), "This principle has been so often decided and so universally declared that it is wholly unnecessary to cite authorities in support of the proposition."

[15]Finn v. Howard, 77 Kan. 421, 94 Pac. 801 (1908); Mann v. Humphrey's Adm's, 257 Ky. 647, 79 S.W.2d 17 (1935); Thomas v. Thomas, 96 Me. 223, 52 Atl. 642 (1902).

[16]Mays Food Products v. Gloster Lbr. Co., *supra* note 11; Correll v. Greider, 245 Ill. 378, 92 N.E. 266 (1910); D'Autremont v. Anderson Iron Co., 104 Minn. 165, 116 N.W. 357 (1908); Gilmore v. Lampman, 86 Minn. 493, 90 N.W. 1113 (1902).

[17]Mathews v. Jones, 149 F.2d 893 (5th Cir. 1945); Catlett v. Chestnutt, 107 Fla. 498, 146 So. 241 (1933); Harris v. Claffin, 36 Kan. 543, 13 Pac. 830 (1887); Welles v. Thornton, 45 Barb. 390 (N.Y. 1865).

[18]Catlett v. Chestnut, *supra* note 17.

[19]*Ibid.*

[20]Concurring opinion of Justice Roberds in Rice v. McMullen.

TORTS—DEFAMATION BY TELEVISION—EXTEMPORANEOUS ORAL STATEMENT CONSTITUTES SLANDER AND NOT LIBEL

During a television broadcast defendant made an extemporaneous oral statement that plaintiff, a government economist, was a communist. HELD: The broadcast defamation constituted slander and no special damages need be alleged, since the statement was slanderous per se. *Remington v. Bentley,* 88 F. Supp. 166 (D.C. S.D.N.Y. 1949).

This decision involves three primary considerations: the legal effect of the words used, the nature of the cause of action, and the criterion for determining liability of the parties.

As to the legal effect of a charge of communistic affiliation, a number of decisions consider an allegation of special damages an element essential to recovery.[1] A like number of cases have held such language to be defamatory per se.[2] The trend reflects the temper of the times,[3] and is at present toward stricter liability.[4] The words in the instant case were not spoken in relation to plaintiff's occupation. Yet the court based its decision on the conclusion that the statement within itself injured plaintiff in his profession as a government economist.[5]

Libel has always been considered written, slander spoken defamation.[6] The bases, other than historical, of this distinction are the permanent nature of the written matter, its potential for great harm, and a presumption of deliberateness of utterance. The courts have conceded that broadcast defamation is potentially as harmful as printed defamation; and that deliberateness relates usually to the originator of the defamation. Therefore permanence of form has generally been the primary consideration.

The decisions are not in agreement as to whether the problem of radio defamation is one involving the law of libel or that of slander. The determinative, though often inarticulate, consideration is apparently whether or not the statement was an extemporaneous interpolation. An Australian court, the first so consider this question, held radio defamation to be slander whether extemporaneous or not, on the ground

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[1]Sullivan v. Meyer, 91 F.2d 301 (D.C. Cir. 1937); Washington Times Co. v. Murray, 299 Fed. 903 (D.C. Cir. 1924) ("linked with the Soviet Government"); Gallagher v. Chavalas, 48 Cal. App.2d 52, 119 P.2d 408 (1941) ("member of the Communist Party"); Toomey v. Jones, 124 Okla. 167, 254 Pac. 736 (1921) ("red"); McAndrews v. Scranton Republican Publishing Co., 67 A.2d 730 (Pa. 1949); Garriga v. Richfield, 174 Misc. 315, 20 N.Y.S.2d 544 (Sup. Ct. 1940) ("communist"); Mencher v. Chelsey, 186 Misc. 877, 61 N.Y.S.2d 147, *modified in part,* 270 App. Div. 1040, 63 N.Y.S.2d 108 (1946).

[2]Wright v. Farm Journal, 158 F.2d 976 (2d Cir. 1947) ("member of Communist Party"); Spanel v. Pegler, 160 F.2d 619 (7th Cir. 1947) ("communist"); Grant v. Reader's Digest Ass'n, 151 F.2d 733 (2d Cir. 1945) ("agent of the Communist Party"); Spanel v. Pegler, 70 F. Supp. 926 (D.D. Conn. 1946) ("sympathetic to Communist Party"); Cole v. Loew's, Inc., 8 F.R.D. 508 (S.D. Cal. 1948); Oppenheim v. Gunther, 193 Misc. 914, 85 N.Y.S.2d 210 (Sup. Ct. 1948); Boudin v. Tishman, 264 App. Div. 842, 35 N.Y.S.2d 760 (1942); Levy v. Gelber, 175 Misc. 746, 25 N.Y.S.2d 148 (Sup. Ct. 1941).

[3]Hayes v. American Defense Society, 252 N.Y. 266, 169 N.E. 380 (1929).

[4]See note 2 *supra.*

[5]Mencher v. Chelsey, 186 Misc. 877, 61 N.Y.S.2d 147, *modified in part,* 270 App. Div. 1040, 63 N.Y.S.2d 108 (1946).

[6]Locke v. Gibbons, 164 Misc. 877, 299 N.Y.S. 188 (Sup. Ct. 1937).

that this distinction would not be apparent to the listener.[7] But without exception[8] the decisions in this country are to the effect that an extemporaneous defamatory utterance constitutes slander,[9] while statements read from a previously prepared manuscript constitute libel.[10]

With this rule in mind, as well as the fact that absolute liability is peculiar to the law of libel, it logically follows that extemporaneous utterances and absolute liability are mutually exclusive. Therefore, a factual determination of the extemporaneous nature of the remark uttered should also determine the criterion of liability.[11] The fallacy in this line of reasoning as applied to the broadcast cases lies in the assumption that reading from a paper ipso facto constitutes a publication by writing. It is the creation of the printed matter which constitutes the publication of a libel to which absolute liability attaches. A disseminator of this matter is liable only to the extent of a lack of due care. Broadcasting over the air by sound constitutes the dissemination of spoken matter, not the publication of a libel.

Although there has been much speculation by the courts[12] and writers,[13] the principal case is the first reported in which defamation has been broadcast by the medium of television.

It is submitted that the court reached the correct decision, yet did so by basing its reasoning on fallacious analogies to common law principles of defamation. A strict application of these technical niceties is undesirable. The problem is *sui generis* and should be treated as such.

William O. Carter

Wills—Devolution of Lapsed Portion Under Residuary Clause

Appellees, sole heirs at law of testator, brought action for construction of residuary clause of testator's will. Testator bequeathed the residue of his property, both real and personal, to four persons, his fiancee, two uncles, and a cousin, each of whom were to receive a certain specified percentage of the residue. One of the uncles, who was to receive twenty per cent of the residuary property, predeceased the testator. The will was silent as to where the twenty per cent, devised and bequeathed to the uncle, should go in the event of the latter's death prior to that of the testator. Held: The lapsed portion of residuary devise or legacy to several persons named and not as a class does not inure to beneficiaries of other residuary portion, unless such intention of testator clearly appears, but becomes intestate estate passing to testator's heirs. *Clark v. Case,* 42 So.2d 109 (Miss. 1949).

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[7]Meldrum v. Australian Broadcasting Co., Vict. L.R. 425 (1932).

[8]*But see* Irwin v. Ashurst, 158 Ore. 61, 74 P.2d 1127, 1130 (1938); Coffee v. Midland Broadcasting Co., 28 Neb. 750, 94 N.W. 1029 (1934).

[9]Locke v. Gibbons, *supra* note 6; *see* Summit Hotel Co. v. National Broadcasting Co., 336 Penn. 182, 8 A.2d 302, 311 (1939); Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 38 N.Y.S.2d 985 (Sup. Ct. 1942) (by implication); Miles v. Wasmer, Inc., 172 Wash. 466, 20 P.2d 847 (1933) (by implication); Weglien v. Golder, 317 Penn. 437, 177 Atl. 47 (1935) (by implication).

[10]Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82 (1932); Grigorieff v. Winchell, 80 Misc. 575, 45 N.Y.S.2d 31 (Sup. Ct. 1943); *see* Lovejoy v. Mutual Broadcasting System, 220 S.W.2d 308, 310 (Tex. Civ. App. 1948).

[11]Yet the courts are reluctant to extend the doctrine of liability without fault, and there is a trend toward basing liability on negligence and applying the test of due care. Kelly v. Hoffman, 61 A.2d 143 (N.J. 1948).

[12]See ,*e.g.,* Barry v. Kirkland, 149 Neb. 839, 32 N.W.2d 757 (1948).

[13]See, *e.g.,* Poland, *Television and Torts,* 25 Mo. L. Rev. 48 (1950).

With the exception of Indiana and Kansas, it has very generally been held, in the absence of statute, that the lapsed portion of a residuary devise and legacy does not inure to the benefit of the other residuary devises and legatees under residuary devise or bequest to several persons, named, or in common, and not as a class, unless the indication of the testator to that effect clearly appears. Such lapsed portion of the residuary property is removed from the operation of the residuary clause and becomes intestate estate, passing to the heirs or distributees.[1]

This is a rule of the English common law that has met with considerable acceptance in this country.[2] It has been asserted that the reason for so holding is that, where a legacy lapses which is part of the residue, it cannot fall into the residue because it is itself a part of it, and it must pass as intestate property.[3] Where the residue is given in distinct parcels, or to several persons as tenants in common, the courts infer that the testator did not intend that any lapsed portion should fall into the residue. He has already expressed all that the residuary legatees shall take.[4] Where the residue is given in halves, to hold that one half lapsing shall accrue to the other would be to hold that a gift of a half might eventually carry the whole.[5] Many courts even say that it is not enough to affect this general rule that the testator had a general intent to dispose of all of his property by will.[6]

This rule, however, has not met with universal acceptance.[7] In one state the courts have held to the contrary, but without discussing the bases of the majority opinion.[8] In two states the rule has been abrogated by statute.[9]

The reasons given for the abrogation of the rule have been that it is a sacrifice of the presumption that a testator does not intend to die intestate as to any portion of his estate, and also of his intent, shown in the appointment of general residuary legatees, that his next of kin shall not participate in the distribution af all.[10] With reference to the language in some decisions that a bequest which is part of the residue in the residuary clause cannot fall by lapse into the residue, because it is itself a part of the residue and must pass as intestate estate,[11] it was said correctly in a Kansas decision that such reasoning appeared rather to play upon words than to point out

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[1]Cattell v. Evans, 301 Mich. 708, 4 N.W.2d 67 (1942); Ryals v. McPhail, 165 Miss. 295, 122 So. 493 (1929); Plummer v. Roberts, 315 Mo. 627, 287 S.W. 316 (1926); Marx v. Hale, 131 Miss. 290, 95 So. 441 (1922); Dresel v. King, 198 Mass. 546, 85 N.E. 77 (1908); Johnson v. Johnson, 32 Minn. 513, 21 N.W. 725 (1884).

[2]40 Cyc. 1452; 28 R.C.L. 338; 1 PAGE, WILLS § 876 (2d ed. 1928); see Note, 28 A.L.R. 1239 (1924).

[3]Lyman v. Coolidge, 176 Mass. 7, 56 N.E. 831 (1900).

[4]Silcox v. Nelson, 24 Ga. 84 (1858).

[5]*Re* Child, 99 Misc. 463, 165 N.Y. Supp. 1071 (1917).

[6]Worcester Trust Co. v. Turner, 210 Mass. 115, 96 N.E. 132 (1911).

[7]31 YALE L. J. 782 (1922).

[8]West v. West, 89 Ind. 529 (1883); Holbrook v. McClearey, 79 Ind. 167 (1881); Gray v. Bailey, 42 Ind. 349 (1873).

[9]R.I. Gen. Laws, c. 254, § 7 (1909): ". . . if a residuary devisee or legatee die before the testator without leaving issue living at the time of the testator's decease, and there be other residuary devises or legatees named in such will in the same residuary clause, such other residuary devisees or legatees named in said clause, whether a class or not, shall take at the testator's decease the share of such residuary devisee or legatee so dying in like proportions as their shares bear one to another as expressed in said will under said residuary clause." Woodward v. Congdon, 34 R.I. 316, 83 Atl. 43 (1912); Jackson's Estate, 28 Pa. Dist. 943 (1919).

[10]Gray's Estate, 147 Pa. 67, 23 Atl. 205 (1892).

[11]Lyman v. Coolidge, *supra* note 3; Dresel v. King, *supra* note 1.

any real difficulty.[12] If a legacy lapses, it passes to some one else, whether it "falls" or whether it merely continues in the residuary clause[13]

Of course the general rule can be avoided by finding a plain intent that the lapsed portion should pass under the residuary clause. This is the usual device used in hardship cases. Nevertheless the danger of a mechanical application of a rule of construction is great. Perhaps the most realistic approach would be to disregard any so-called rule and to undertake either to construe in each case the intent of the testator or where that is not available, to reach the fairest possible result under the circumstances.

In the instant case, the court decided that the residuary devise was not a gift to a class. Having decided this point, it then applied the general rule of construction. Thus, while there is some merit in the reasoning of the minority, it is apparent that this jurisdiction will continue to follow the general rule.

Ancil L. Cox, Jr.

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[12]Cobett v. Skaggs, 111 Kan. 380, 207 Pac. 819 (1922).

[13]Snelling's v. Downer, 193 Ga. 340, 18 S.E.2d 531 (1942) (A distinction was drawn between the devolution of a lapsed portion of a residuary devise of real property and a lapsed portion of residuary legacy of personalty, with the court allowing the personal property to pass to the other residuary beneficiaries).

RECENT BOOKS

LIVING LAW OF DEMOCRATIC SOCIETY. By Jerome Hall. Indianapolis, Bobbs-Merrill, 1949, pp. 146. $2.50.

This book has as its thesis that since democracy is a distinctive legal organization its issues are legal problems; these lead to questions of jurisprudence, the central inquiry of which is: What is law? This question Professor Hall undertakes to answer in three different aspects which are the divisions of the book: (1) Law and Legal Method (2) Law as Valuation and (3) Law as Cultural Fact. The approach is that of the philosopher and is weighted with the history and criticisms of philosophy in its legal phases from Hesiod to Frank.

The book had its origin in a series of lectures given by the author at Pacific University in 1947. In his first sentence Professor Hall modestly states that he has tried to make a contribution to legal philosophy. Unquestionably he has succeeded. In his last sentence he expresses the hope that disagreement in the higher levels of theory will not prevent cooperation in vitally needed research by the many sharing the common purpose of preserving and expanding the law of democratic society—an inspiring appeal to those capable. Since the intervening treatment is characterized by sincerity, scholarship, and cogent presentation, no doubt both the initial and ultimate objective of the author will be realized in degree. It is probably a compliment however to add that his hope elsewhere expressed that lawyers and laymen will derive some additional insight into the significance and potentialities of their vocations from the book is hardly congruous considering the plane of discourse. In any case it will never lead to controversy at either a grass roots convention or a cracker-barrel discussion. This reviewer was flattered to realize that he compehended considerable portions of the author's meaning. But after all it's a small book!

R. J. F.

TAX PLANNING FOR ESTATES. By William J. Bowe. Nashville, Vanderbilt University Press, 1949, pp. 93. $2.00.

This book by Professor Bowe[1] gives a maximum amount of information on the subject of estate planning, in a minimum number of pages. The method used is to take a typical situation in estate planning, discuss it, and then illustrate the workings of the applicable plan by the means of examples.

Although the situations and solutions discussed in the book are involved to the point where they will prove informative to a person well versed in estate planning, the non-technical language used throughout the book makes it of particular value to the beginner in the field of estate planning. The examples used make the discussion of what is an involved subject particularly easy to follow.

Professor Bowe points out that no particular plan for the disposition of an estate should be adopted solely because of tax considerations, but that this is an important factor which should receive great weight in all cases. Great tax savings can often be effected by such means as an inter vivos gift, charitable bequest, or using care that the greatest maximum benefit is attained from the marital deduction.

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[1]Professor of law, Vanderbilt University. Author of taxation articles which appear in the Vanderbilt, Tennessee, and Cincinnati Law Reviews.

This book may well serve as a handbook for the practitioner or trust officer. It is well documented for easy reference to the source materials used.

*Robert J. Hobby**

MODERNIZING MISSISSIPPI'S CONSTITUTION. By W. N. Ethridge, Jr. University of Mississippi, Bureau of Public Administration, 1949, pp. 116.

This timely and scholarly study, although admittedly brief in its development, is a good illustration of what needs to be done in Mississippi to stimulate the thinking of the public concerning the need for a revision of our fundamental law. Professor Ethridge, in cooperation with the others whose aid he acknowledged, is to be commended for his efforts to focus our attention on the wide discrepancies between Mississippi's political machinery and its present-day economic and social status.

There are four principal chapters containing the author's suggestions, and it is interesting to note his major recommendations. In the chapter entitled "The Voice of the People," Professor Ethridge analyzes the legislature of Mississippi, and the defects in its functioning. He suggests that the size of the legislature should be reduced; that any qualified elector should be qualified to be a member of the legislature; that the salaries should be increased; that annual sessions should be held; that a legislative council would serve a commendable purpose; that a unicameral legislature should be tried; that the limitations in the constitution dealing with legislative procedure should be eliminated; that a legislative reference and research bureau be made a permanent aid to the legislature; and that the legislature should have the authority to call itself into special session.

Another chapter deals with two particular problems of the legislature: the power to pass special laws, and the power of apportionment. Recommendations here made are that limitations on special legislation should be repealed, and that reapportionment should be carried out by use of the only feasible method, a constitutional convention. The glaring inequalities in the present legislative apportionment are indicated in an interesting table.

The problem of executive and administrative power is discussed under the title, "One Hundred and Three Bureaus." Among the recommendations here indicating defects in our present constitution are that the governor should be allowed to succeed himself; that his compensation is inadequate; that the electoral college method of electing the governor, as well as all other state officers, should be eliminated; that the governor should have an independent power of investigation; that his power to appoint and remove should be increased; that he should be allowed to dispose of legislative acts after adjournment; that the period of time for consideration of a bill should be extended; that his legislative powers should be reduced by allowing the legislature to overrule his veto by a majority vote; and that the governor should have the power to grant paroles.

In regard to other elective officials and the various administrative agencies, the author relies on the Brookings Report of 1932, to which he refers. He would eliminate the election of the various administrative officials, transferring the power to the governor to appoint these departmental heads, analogous to the presidential power of appointment.

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*University, Mississippi.

Specifically the author believes that the office of lieutenant governor should be abolished or turned into an administrative assistant to the governor; that the attorney general, secretary of state, and treasurer should be appointed; that the work of the auditor should be divided, based on the type of activity performed, and that the office of comptroller be under the supervision of the governor, with the legislature selecting and having direct responsibility over the office of the auditor. The superintendent of education should be selected by the state board of education with the board being made up of personnel other than ex officio; and the office of state librarian should be eliminated, with its duties transferred to some executive department. In reorganizing the administrative agencies, the governor should be given the constitutional power to do the job himself, and administrative rules should not be effective until published as provided by law.

From the extensive suggestions made in the chapter called "The Courts Are Public Business," the reader will note Mr. Ethridge's belief in the urgent necessity for a thorough overhauling of our court system. He argues that Mississippi should give careful consideration to the adoption of either the Missouri or California plan for the selection of judges both of which plans are a compromise between the elective and appointive systems. Our separate courts of law and equity should be combined and a unified court system adopted. The legislature should provide for an inquiry into the work load of the respective court districts, to begin to meet the present need for redistricting the territorial areas for both circuit and chancery courts, which need is substantiated by interesting statistical data.

Justices of the peace should be eliminated, thus doing away with the fee system; and a county court serving the purposes of the present justices of the peace and municipal courts should be established in each county. In regard to the supreme court, the author recommends that its membership be increased to seven or nine; that, pending the constitutional increase of this membership, commissioners be appointed to assist and advise the court; that the supreme court should be selected from the state at large; and that an administrative office be attached to this body. Additional suggestions are that a retirement and pension system be provided for all courts; that the courts be given rule-making power; that the clerks of the courts be appointed by the courts themselves; that a provision be made for a continued compilation of case records; and that a judicial council be set up.

As Professor Ethridge states, this study is by no means intended to be definitive; many important problems are merely suggested. But without doubt the author's discussion can be used as a spring-board looking to the calling of a convention to revise thoroughly the Constitution of 1890. This document and its 33 amendments, as Mr. Ethridge says, served well until fairly recently. It is heartening to the teachers of political science who have championed perhaps less effectively and less penetratingly a majority of the recommendations made that he has lent his talents to this study. The bench, the bar, and the public generally can profit greatly from such a survey.

*H. B. Howerton**

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*Chairman, Department of Political Science, University of Mississippi, University, Mississippi.

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PAYS YOU FOR . . .	Total disability, if incurred before age 60, per month for 24 months;	$400.00
	PLUS—a monthly income thereafter FOR LIFE	$200.00
	Total disability, if incurred after age 60, per month for 24 months;	$200.00
	PLUS—a monthly income thereafter FOR LIFE	$100.00

ACCIDENTAL SPECIFIC LOSS BENEFITS

PAYS YOU FOR . . .	Double Limb or Eye Loss	$10,000.00
	Single Limb or Eye Loss	3,000.00

OTHER IMPORTANT FEATURES

- No house confinement required for either accident or sickness.
- No automatic termination age.
- Nonaggregate—Full limit of benefits paid for each period of disability.
- Waiver of premium provision.
- Incontestable clause.
- Arbitration clause.
- Full 24-hour coverage for both sickness and accident.
- No restrictive riders or limitations may be imposed on any policyowner after policies have been issued.
- Benefits are not reduced because of occupational change of duties.
- Accident benefits are effective from the first day.
- Commercial air travel passenger coverage.
- Pays partial accident disability benefits per month for 3 months — $160.00.
- Licensed to operate in this state.
- Benefits are effective for sickness originating more than 30 days after the policy date.
- Sickness benefits are payable beginning with the eighth day of compensable disability.
- Covers tuberculosis and heart trouble originating more than six months after policy date. Covers all sickness except insanity or mental disorders.
- The Companies offer eligible members of your profession policies which guarantee your right to renew except for these reasons only: Nonpayment of premiums; if the insured retires or ceases to be actively engaged in the practice of the profession; or, if renewals are declined on all like policies issued to members of your profession in your state.
- This means that the Companies cannot decline to renew any individual policy without similarly declining to renew all like policies issued to members of your profession in your state.
- Plan is now in operation in this state.

COULD YOU — AND YOUR FAMILY — LIVE WITHOUT INCOME
PROTECT YOUR PROFESSIONAL INCOME — NOW

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OMAHA, NEBRASKA

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